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Supreme Court of the United States

OCTOBER TERM, 1953

No. 22

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, APPELLANT,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA AND CITY OF LOS ANGELES

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

FILED MARCH 20, 1953

Jurisdiction Postponed May 18, 1953

SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,

Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and CITY OF LOS ANGELES, a Muncipal Corporation,

Respondents,

PETITION FOR WRIT OF REVIEW—Filed July 24, 1952

Your petitioner, hereinafter referred to as Santa Fe, respectfully applies for a Writ of Review, by this, its verified petition, for the purpose of determining the lawfulness of Decision No. 47344 of the Public Utilities Commission of the State of California, dated June 24, 1952, and the Order on Rehearing contained therein; and in this behalf sets forth the following facts and causes for the issuance of the writ:

I.

Your petitioner is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kansas, lawfully doing business in the State of California and in the City of Los Angeles, as a common carrier by railroad, between points in California and also in interstate commerce, with [fol. 2] its principal place of business in California at 121 East 6th Street, Los Angeles, California. As such common carrier, your petitioner was at all times mentioned herein, and is, subject to the provisions of the Public Utilities Code and the Public Utilities Act of the State of California.

II.

That at all times herein mentioned the respondent, Public Utilities Commission of the State of California, was and now is an administrative and quasi-judicial tribunal,

created and existing under and by virtue of Sections 22-24, inclusive, of Article XII of the Constitution of the State of California, and by virtue of the Public Utilities Code and Public Utilities Act of California; and at all times herein mentioned the respondent, City of Los Angeles, was and now is a municipal corporation, created and existing by virtue of Article XI of the Constitution of California, and by virtue of statutory authority. For convenience, respondents will be sometimes referred to as "the Commission," or "the City," respectively.

III.

That on the 4th day of June, 1948, the City of Los Angeles filed its Application No. 29396 with the Public Utilities Commission of California, seeking authority to enlarge two existing underpasses on Washington Boulevard below petitioner Santa Fe's tracks. After public hearing and submission of points and authorities, the Commission, by its Decision No. 43374 dated October 4, 1949, authorized the City to enlarge the underpasses, further providing that the expense thereof was to be borne by the City, with the exception of the sum of $95,160.00 which was to be paid by Santa Fe. On November 22, 1949, [fol. 3] the City filed a petition for rehearing, and on December 2, 1949, Santa Fe filed a petition for rehearing.

Thereafter a rehearing was granted March 28, 1950, and public hearings were held thereon, followed by submission of points and authorities, and, on November 28, 1951, by oral argument before the Commission *en banc*.

On June 24, 1952, the Commission rendered its Decision No. 47344, the decision herein complained of, sometimes hereinafter referred to as the decision, in which Santa Fe was ordered to pay 50% of the cost of the proposed structures in contrast with the Commission's earlier Decision No. 25069, dated August 15, 1932, wherein Santa Fe was ordered to pay 25% of the cost of enlarging these same structures. After this decision the City did not build within the required time limit of one year and the order lapsed and became ineffective pursuant to its terms. Thereafter the 1952 decision increased the amount to be paid by Santa Fe from $95,160.00 as provided for in Decision No.

43374 dated October 4, 1949, to $284,677.50 for the reasons explained in Decision No. 47344 dated June 24, 1952.

IV.

That the two underpasses herein concerned are located under the Santa Fe at Washington Boulevard, a principal East-West arterial highway across the City of Los Angeles, between Soto Street and Santa Fe Avenue. The railroad above the underpasses is near a junction of the Santa Fe's harbor line, consisting of a right-of-way 66 feet wide which was placed in operation on September 23, 1887; and one [fol. 4] of Santa Fe's main lines to the East, consisting of a right-of-way 100 feet wide which was placed in operation on November 24, 1888.

Prior to 1914, three tracks of the Santa Fe crossed the area now known as Washington Boulevard, at grade. There was no open street at or near the underpasses in the present location of Washington Boulevard. In 1914, pursuant to a contract between the City and Santa Fe, the two presently existing underpass structures, each 20 feet wide, approximately 200 feet apart, were constructed to give the City's garbage trucks easier access to a garbage disposal plant located east of the tracks. The City and Santa Fe by agreement each paid one-half of the costs thereof.

Subsequent to the building of the railroad tracks the City acquired easements for street purposes, partly from Santa Fe, and in 1931 constructed a bridge across the Los Angeles River a short distance easterly of the underpasses, and opened up Washington Boulevard as an arterial street from the Pacific Ocean on the west to Whittier Boulevard, east of the City. In 1926, Santa Fe required for railroad purposes, and built at its sole expense, an additional superstructure and track to provide a second main line track. Thus each bridge over Washington Boulevard now carries two tracks.

V.

By its Decision No. 47344, dated June 24, 1952, the Commission unlawfully, arbitrarily, unreasonably and unconstitutionally exceeded its authority, and its jurisdiction, and deprived Santa Fe of its constitutional rights to due process and equal protection of the laws, and of its property

without just compensation, placing an undue burden on interstate commerce, all in violation of the Constitution of [fol. 5] the United States of America, 5th and 14th Amendments, and the Commerce Clause, and in violation of the California Constitution, Article I, Sections 13 and 14, in the following particulars:

A.

Under the guise of the police power, the Commission assessed 50% of the cost of the proposed projects to the Santa Fe. This figure is, on its face, an arbitrary and excessive determination without any apparent effort to determine, mathematically or from an actuarial standpoint, or otherwise, the value of the benefits, if any, Santa Fe could receive from the construction of the underpasses, the value of any additional safety factor which the new underpasses might provide either to Santa Fe, to the public, or at all, or to make the imposition bear reasonable relation to the evils to be eradicated or the advantage to be secured.

Just how the Commission arrived at 50% in a nice, round percent, is nowhere apparent either in the evidence or in the Decision. If the Commission utilized its sizeable staff and ample public funds to determine, on a rational basis, what the percentage (if any) assessed to Santa Fe should be, the record and the Decision fail to disclose the method; and the Commission must have gone outside the record in so determining.

B.

The Rehearing Order contained in the Decision takes Santa Fe's property without just compensation, in violation of the 5th Amendment of the United States Constitution, and Article I, Section 14, of the California Constitution.

[fol. 6] At page 18 of the Rehearing Order, the Commission finds that the proposed improvement is "not without benefits" to the railroad, allegedly in the operation of longer trains without delays, without hazard of accidents, and in replacement of a depreciated bridge with a newer bridge.

After indicating that the benefits to Santa Fe are *de minimus*, the Commission assesses to Santa Fe one-half of the

costs, an excessive amount, thus exceeding its authority and violating the United States Constitution, in that the benefits to be derived by Santa Fe are not nearly equivalent to the sum assessed against it. There is no indication in the Rehearing Order that there is either a reasonable relation, or any relation, between the benefits mentioned in the order and the sum assessed to the Santa Fe.

C.

The Rehearing Order burdens interstate commerce, in violation of the commerce clause of the United States Constitution, and the "National Transportation Policy" as expressed in the Interstate Commerce Act (54 Stat. 899). The underpasses in question are but one project in a state looking forward to several such projects in the future. Santa Fe is an interstate railroad, and must face the cost of other such projects in this and other states, making the high cost here assessed an unconstitutional burden on interstate commerce.

The Rehearing Order (at page 16) apportions the costs in the exercise of its "sound discretion," for the public [fol. 7] convenience and necessity, thus arbitrarily deciding that Santa Fe should pay the amount the Commission desires that it should pay. Therefore:

(1) If the 50% assessment so fixed was derived from an exercise of the Commission's police power, it is limited by the constitutional safeguard that there must be a reasonable relationship between the amount assessed and the evils to be avoided and results to be accomplished, or

(2) If the Commission exercised the power of eminent domain in making the assessment, Santa Fe is entitled to just compensation in the form of benefits to be derived from the enlargement of the underpass structures and to a reasonable assessment on that basis.

There is no substantial evidence justifying an assessment against Santa Fe of one-half of the costs, under either the police power or the eminent domain, or both.

D.

The Rehearing Order arbitrarily increased Santa Fe's proportion of the costs from 25% as assessed in 1932

(See 37 C. R. C. 787), to 50% in this 1952 order. There is no reasonable basis in the evidence for doubling the percentage of the apportionment of costs against Santa Fe.

The Rehearing Order disregards the overwhelming evidence that changed conditions in the interval of the past 20 years would warrant a smaller, rather than a larger, assessment of costs against the railroad.

[fol. 8]

E.

The Decision fails to find ultimate facts on material issues, makes findings not supported by any substantial evidence, and makes findings contrary to the evidence, thus denying to Santa Fe its constitutional right to procedural due process.

At page 17 of the order, for example, the finding is made that the proposed construction is to meet *local* transportation needs, and that the City's contribution must come from local funds. However, the substantial evidence is to the contrary.

At page 18 of the Rehearing Order, there is a finding that the railroad will benefit by the construction; whereas the uncontradicted evidence shows that it can operate long trains without delay, and without hazard of accident, over the existing structures, and that the present bridges, built in 1914, still have 50 years, or more, of use and thus are *not* 75% depreciated.

The Commission fails to make any finding respecting the important factor of avoiding delay to vehicular traffic, the benefits to be derived by vehicular traffic from enlarging the underpasses, or the primary necessity for the enlargement being the need for increasing traffic capacity for motor vehicles.

F.

Under the guise of constitutional authority, the Commission requires Santa Fe to pay one-half of the costs of a major improvement of Washington Boulevard, a principal East-West street and highway across the City and of Los Angeles County. The Rehearing Order thus requires Santa Fe to subsidize its competitors, the commercial [fol. 9] truckers, which the undisputed evidence discloses utilize Washington Boulevard extensively and, if the under-

passes are enlarged, will make even greater use for access to and from Los Angeles, the industrial area, the harbor and the hinterland.

The Commission refused to make any findings on, or give any effect to, the substantial undisputed evidence that in recent years the railroads have ceased to expand; whereas the population of the City and the State of California has increased over 500%, that the use of automobiles, buses and trucks has increased tremendously, and highway carriers have taken over an increased proportion of all commercial transportation by the use of larger, wider, higher and faster automotive equipment and would reap the greatest benefit from the proposed construction.

The Commission, moreover, failed to make any finding on, or to give any effect to, the substantial undisputed evidence that the factor of delay—particularly as to the commercial trucking industry—is the most important factor necessitating the proposed enlargement of the existing grade separations. The Commission thus deprives Santa Fe of its constitutional right to equal protection under the laws.

G.

If the Rehearing Order becomes effective and final, Santa Fe will suffer irreparable damage, and the loss of approximately $285,000.00.

H.

The pleadings, testimony and exhibits summarized in the Appendix are by this reference made a part hereof. [fol. 10] Petitioner also files concurrently herewith its Points and Authorities in support hereof.

Wherefore, your petitioner respectfully prays:

1. That the writ of review issue out of this court to the Public Utilities Commission, demanding it to certify fully to this court, at a specified time and place, the record and proceedings in this cause, that the same may be inquired into and determined by this court;

2. That the said matters and records be fully heard and considered by this court, and that it be ordered, adjudged and decreed that the Rehearing Order made by the said

respondent Commission against your petitioner be annulled, vacated and set aside;

3. That in the meantime the respondents, and each of them, be required to desist from further proceeding in the said matters to be reviewed and that the order requiring petitioner to pay a portion of the costs of the proposed projects be stayed;

4. That your petitioner recover its costs herein, and that it have such other and further relief as may be proper and just in the premises.

Robert W. Walker, Joseph H. Cummins, By Joseph H. Cummins, Attorneys for Petitioner, The Atchison, Topeka and Santa Fe Railway Company, a Corporation.

[fol. 11] *Duly sworn to by S. A. Forrester. Jurat omitted in printing.*

[fol. 12] APPENDIX "A" TO PETITION.

PETITION FOR REHEARING OF PROTESTANT, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY.

To the Honorable, the Public Utilities Commission of the State of California:

The Atchison, Topeka and Santa Fe Railway Company, the protestant in the above entitled proceeding, hereby respectfully petitions for a rehearing in respect to the matters determined in said proceeding by Decision No. 43374 of this Commission. There is also appended hereto an argument in support of this petition and an argument in opposition to the petition for rehearing heretofore filed by applicant, The City of Los Angeles. This petition for rehearing is based on the following grounds:

I.

In view of this Commission's findings that the City is the sole party to be benefitted by the proposed structure, the conclusion of this Commission is erroneous and contrary to the law that the Santa Fe should be assessed one-

half of the costs attributable to the existence of the railroad at the crossing.

II.

The facts and the testimony, both oral and written, and the findings of this Commission are all to the effect that the proposed structure will solely benefit the City and will not only be of no benefit to the Santa Fe but will actually be a detriment.

III.

The decision is contrary to the law in that it is contrary to the decisions of this Commission which have for [fol. 12a] almost twenty years followed the "benefit" theory in assessing costs in cases such as this.

IV.

The decision is contrary to the law in that the attempted assessment against a railroad of any costs in a case such as this in which no benefits whatsoever will accrue to the railroad from the proposed structure is an unconstitutional taking of property without due process of law within the bars of the Fourteenth Amendment to the United States Constitution and Article I, Section 13 of the Constitution of California.

V.

Appended hereto is an argument in support of the above propositions.

Wherefore, protestant, The Atchison, Topeka and Santa Fe Railway Company, respectfully requests that this Honorable Commission grant a rehearing in this case and that upon such rehearing this Honorable Commission issue its order requiring the City of Los Angeles to bear the entire cost of the proposed widening of the existing grade separation at Washington Boulevard and requiring that no part of such cost be allocated to The Atchison, Topeka and Santa Fe Railway Company.

Dated at Los Angeles, December 2, 1949.

Respectfully submitted, Robert W. Walker, William F. Brooks, By Robert W. Walker, Attorneys for Protestant, The Atchison, Topeka and Santa Fe Railway Company.

[fol. 13] APPENDIX "B" TO PETITION.

INTRODUCTION

The following is a summary of the voluminous record in this matter, consisting of a summary of the pertinent pleadings, testimony and exhibits:

SUMMARY OF PLEADINGS.

A. The Original Application.

The application of the City of Los Angeles, filed June 4, 1948, alleges that the two underpasses of Santa Fe's tracks below Washington Boulevard are approximately 200 feet apart; that Washington Boulevard is a public street extending from the Pacific Ocean near Venice, Easterly, through the entire breadth of the City for a distance of several miles East of the City to Whittier Boulevard, traversing the principal industrial district of the Los Angeles Metropolitan Area; that if its usefulness were not impaired by the narrowness and limited vertical clearance of its underpasses, it could and would be one of the principal carriers of traffic to, from and within the industrial district.

That, 520 feet East of the underpasses, Washington Boulevard crosses the Los Angeles River, which was bridged in 1931; that the Santa Fe's harbor line and main line cross Washington Boulevard on existing trestles constructed on steel girders supported by concrete abutments, and have a vertical clearance of between 13 and 14 feet; that these trestles were built in 1914 to facilitate access to the City's garbage reduction plant; that the cost was borne by the City and by Santa Fe equally; that in 1914 [fol. 14] the main line of Santa Fe consisted of one track, but in 1926 Santa Fe at its own expense added a second track and reconstructed the trestle for that purpose;

That in 1914 there was very little motor traffic in the area, but since that time the City has grown immensely and the motor vehicle traffic, including commercial trucking, has increased enormously; and that the industrial district nearby has become one of the great industrial districts of the nation;

That the underpasses, because of their narrowness and

inadequate vertical clearance, constitute a hazardous impediment to traffic, and have caused many serious accidents and traffic congestions; that large commercial trucks can pass only at peril of sideswiping;

That there is no bus transportation, although there is a public demand for it, because of the limitations of the underpasses; that persons who work in the area must travel by circuitous routes;

That because of congestion, many motor vehicles, and particularly large trucks which would normally use Washington Boulevard, are diverted to other streets, resulting in loss of man and vehicle hours and increased expense of transportation;

That, for the above reasons, the public need, safety, welfare and convenience require that the underpasses be enlarged, and their height be increased;

That the City proposes to widen the underpasses to 90 feet, with 15 feet clearance above; and prays for an order authorizing the enlargement of the underpass structures and requested that the Commission allocate the costs between Santa Fe and the City.

[fol. 15] B. The Answer.

The answer of Santa Fe alleged that the cost of enlarging the existing underpasses should be borne by the applicant City; that any need for wider structures cannot be traced to any requirements of the Railroad; that the present structure is wholly sufficient for railroad purposes, and that any need for enlarging the structures is brought about solely because of increase in vehicular traffic;

The answer further alleged that any obligation Santa Fe had to share the costs of grade separation structures was satisfied by sharing the costs of the original construction in 1914, and that when traffic needs of the railroad required additional trackage over Washington Boulevard in 1926, it was paid for solely by Santa Fe;

Conversely, that when the Boulevard below the tracks needs expanding because of increased vehicular traffic, the railroad should not have to pay part of the cost;

That no benefit will accrue to the railroad but, on the

contrary, enlarging the structures will compel Santa Fe to defray the cost of maintaining larger bridges;

That to require Santa Fe to pay part of the cost would result in a direct subsidy to its competitors, in the form of trucks and buses, who will derive all of the benefits;

That the purpose of widening the underpasses is not to avoid collisions with trains, but to provide better facilities for vehicular traffic;

Santa Fe prays, therefore, that it not be required to bear any portion of the cost of rebuilding the Washington Boulevard underpasses.

[fol. 16] C. Decision No. 43374 of the Public Utilities Commission Dated October 4, 1949 (Superceded by the Order on Rehearing.)

The Public Utilities Commission rendered its opinion and decision, reciting from the petition and answer, and from the testimony;

It referred to the 1932 decision when the same parties were before the Commission in a similar proceeding, involving the same two crossings, at which time the City sought to enlarge the two grade separations to a width of 56 feet; that in 1932 the Commission issued its order authorizing the widening, and apportioning costs: 25% to Santa Fe, and 75% to the City;

In its 1949 order, the Commission finds: That the widening of the underpass "is now necessitated by the increase in vehicular and pedestrian traffic. . . ." (P. 7);

It noted that the vicinity had become a leading industrial area of Los Angeles and its environs, and that a large amount of truck traffic hauled to and from the area;

It stated that a fair view of all of the evidence supported Santa Fe's contention that none of the factors necessitating enlarging the underpasses was due to the operation of the railroad (p. 8). It stated:

> "Thus we are specifically faced with the problem of who shall pay the cost of widening of the underpass where the necessity for such widening is not due to the [fol. 17] activities of the railroad, but rather to the needs of the automotive and pedestrian traffic." (P. 8.)

The Commission noted Exhibit 20, General Administrative Memo. No. 325 of the Public Roads Administration, Federal Works Agency, United States Government, limiting costs of new grade separation projects assessable to the railroad at no greater than 10%, and in case of reconstruction of existing separation structures directing that no contribution to the cost shall be required of the railroad.

The decision quotes with approval from its 1932 decision, wherein the Commission held that direct financial benefits is not the sole test to use in apportioning costs, and that due consideration should be given to the obligations of each party, as well as to the benefits derived by each;

It held that Santa Fe should bear 50% of the cost, pursuant to a formula whereby the Commission deducted 20 feet of the proposed 90-foot structure to allow for the width of existing underpasses and held that the excess width, over 56 feet, was attributable to future City planning; that, therefore, only 36 feet of the structures was attributable to the presence of the railroad, and the railroad should pay half of the cost of 36/90 of the bridge; which came to $95,160.00.

[fol. 18] Summary of the Evidence Taken at the Original Hearing and considered as Part of the Evidence on the Rehearing by Stipulation Between the Parties.

H. F. Holley, applicant's witness, testified that he was employed by the Automobile Club of Southern California as Assistant Chief Engineer; he submitted Exhibit 1 and stated that the need for the enlarged underpasses was the result of increased vehicular traffic; he had made no study of railroad operations or needs at the place in question (Tr. pp. 7-8).

He noted that there is a tremendous flow of traffic on Washington Boulevard, and recommended that vertical clearance be increased from 13.66 feet and 13.77 feet, now existing, to 14½ or 15 feet (Tr. p. 10).

Howard P. Mason, applicant's witness and Secretary of the Metropolitan Traffic & Transit Committee of the Los Angeles Chamber of Commerce, testified to the increase in population and vehicle registration in Los Angeles (Tr. p. 11).

Ralph T. Dorsey, applicant's witness and Principal Traffic Engineer of the City, testified that Exhibit 2 showed the amount of traffic using streets in the vicinity of the grade separations, the directional volume of such traffic, and the left and right turns made by the traffic (Tr. p. 13). He stated that the existing underpasses are potentially and actually a hazardous condition (Tr. p. 18); he submitted Exhibits 3 to 7, inclusive, depicting insufficient vertical clearance and inadequate horizontal clearance; that there is a record of some accidents there; traffic con- [fol. 19] ditions would be relieved throughout the area by an adequate underpass (Tr. p. 19). He recommended the construction of a 3-lane underpass each way, each lane 11 feet wide, and at least one sidewalk (Tr. p. 21).

Mr. Dorsey further testified that a public benefit would result from widening the underpasses, for the reason that traffic would continue with less delay and that Washington Boulevard could be used as a feeder for new freeways (Tr. p. 29); thus relieving parallel streets of a considerable burden (Tr. p. 31); that a crosstown busline would be one of many public benefits, reducing traffic since the public would use a bus instead of their own automobiles (Tr. p. 32); thus reducing hazards by reducing the number of automobiles used (Tr. p. 33).

Hugo H. Winter, applicant's witness and Street and Parkway Designing Engineer of the Bureau of Engineering of the City (Tr. p. 39), testified to the cost of the proposed structures, and to the history of the construction of the existing separations; he also submitted designs for bridge structures. (His testimony is not in dispute and will not be set forth at any greater length.)

Harold O. Springer, applicant's witness and Engineer with the City, testified to costs of the proposed structures, and stated that it was the City which felt the need for widening the underpasses (Tr. p. 72).

K. Charles Bean, applicant's witness and Chief Engineer and General Manager of the Department of Public Utilities & Transportation of the City of Los Angeles, testified that as long ago as 1939 it was recommended that a busline be inaugurated on East Washington Boulevard; that the Los Angeles Railway Company felt that such a

line could not be of maximum benefit until there was a [fol. 20] better way of crossing the Santa Fe, the existing underpasses being inadequate and constituting an unreasonable hazard for the operation of a busline—studies indicated sufficient patronage, and such a service would help other lines relieve congestion downtown, but could not operate successfully because of too much delay (Tr. pp. 76-77).

Milton Breivogel, applicant's witness and Principal City Planner of the City, described the industrial area in the vicinity of East Washington Boulevard (Tr. pp. 78, 84); he also testified concerning population and vehicle registration increases, giving the number of persons residing within a five and a ten mile radius of the underpass (Tr. p. 82).

According to this witness, all streets today are loaded with traffic, and more street capacity must be provided for vehicles, especially in the area involved, where public transportation would become increasingly important (Tr. p. 86).

A. M. C. Blanchard, witness for protestant, Chief Engineer of the Coast Lines of the Santa Fe, testified to the history of the construction of the existing underpasses, outlining the proceeding before the Commission in 1932 in which Santa Fe was assessed 25% of the cost of enlarging these grade separations, which order lapsed after one year because construction was not commenced; that in 1932 the City sought to build a 56-foot wide street under Santa Fe's tracks, but now seeks a 6-lane trafficway, obviously necessitated by increased vehicular traffic; according to this witness, the sole beneficiary of the improvement would be the public, which should pay the entire cost.

[fol. 21] Mr. Blanchard compared the instant situation with Administrative Memo. No. 325 of August 26, 1948, on the subject "Railway Benefit and Liability under the Federal Aid Highway Act of 1944" pursuant to which the railroad would not have to bear any cost for reconstruction of existing separation structures (Tr. p. 94) there being no ascertainable benefits therefrom.

He pointed out that in Arizona, in the preceding year, two separations on the Santa Fe had been reconstructed, in neither of which cases was Santa Fe called upon to pay any of the cost (Tr. p. 95).

Mr. Blanchard denied knowledge of any case in which the public had contributed to the cost of a grade separation involved in the building of a new line of railroad; and, in the past, stated that the Santa Fe in building a new line had paid the entire cost (Tr. p. 97).

In his opinion, the railroad would not be benefited by enlarging these subways, and the public would be the sole beneficiary (Tr. p. 98); that the present structures are wholly sufficient for future railway requirements, and the new structures would only increase the costs of maintenance and improve the highway facilities for trucks and buses, which are competitive with the railroad (Tr. p. 99).

The following is EVIDENCE ON REHEARING, commencing December 27, 1950:

Harold O. Springer, recalled as a witness for applicant, testified regarding heights and costs of bridges, the feasibility of widening the bridge over the Los Angeles River immediately to the east, and gave the height of existing bridges over the street as 13.66 feet and 13.75 feet (clearances) (Tr. p. 25). (There is no dispute in the evidence as to the types or costs of bridges.)

[fol. 22] Hugo H. Winter, recalled by applicant, testified that it is feasible to widen the Los Angeles River bridge at moderate expense; he recommended construction of underpasses wider than 56 feet (Tr. p. 37); he described Washington Boulevard as one of the very important traffic-carrying arteries leading across the City and into the County (Tr. p. 38); traffic lanes of 9 feet are not now considered adequate; that 10 feet is a suitable minimum, especially on a highway like Washington Boulevard where there is a relatively heavy flow of truck traffic; that two roadways of 33 feet width are recommended; that the reason 9 foot lanes are insufficient is because cars and trucks have increased in width, and must take into account that they now travel faster (Tr. pp. 38-39); that it is proper to provide for pedestrian use of the street, although there are no sidewalks now existing between Santa Fe Avenue and Soto Street in Washington Boulevard (Tr. pp. 40-41).

(His testimony regarding the costs of the proposed structures is not disputed (Tr. p. 44).)

Mr. Winter testified that, on freeway construction, six feet is allowed from the curb to the base of the abutment to keep cars and trucks from crowding toward the center of the roadway; with two 10-foot lanes and opposing traffic, that the abutment adjacent to the roadway is a hazard, particularly for large trucks; that in former years 14 feet vertical clearance was considered desirable, but that now on modern grade separations a minimum of 15 feet is provided (Tr. p. 48); that City officials are agreed that Washington Boulevard is one of the City's very important east-west thoroughfares, it carries tremendous traffic as far east as Alameda Street where it is improved; that east of Alameda Street there is a large open pit which prevents [fol. 25] complete improvement on the permanent lines of the boulevard; that between Santa Fe Avenue and Soto Street are the narrow railroad Santa Fe underpasses which prevent the complete improvement of Washington Boulevard in that section; that there is a tremendous diversion of traffic between Alameda Street and Soto Street because of the inadequacy of the existing roadways in both sections (Tr. pp. 51-52).

He testified that trucks and mixed traffic make necessary the construction of wider traffic lanes (Tr. p. 72); that the *prima facie* speed limit on Washington near the underpasses is 25 miles per hour (Tr. p. 72); that the need for higher vertical clearances arises solely because of the height of trucks (Tr. p. 74); that the existing underpass structures became inadequate when Washington Boulevard bridge was built across the river in 1931 (Tr. p. 81); that before Washington Boulevard was made a through street it simply handled traffic in and out of the garbage disposal plant and the City's maintenance yard (Tr. p. 82); that when the City built the bridge across the river there was a pressing need of opening up Washington Boulevard between Santa Fe Avenue and Soto Street, so that it could become a link in not only a cross-city but, also, a cross-county highway that was rapidly being developed (Tr. pp. 82-83).

Mr. Winter stated that there is a provision being made to connect Washington Boulevard at Telegraph Road with the Santa Ana Freeway that is being constructed (Tr.

p. 84); that the delay factor is one of the large factors in establishing the need of these grade separations; that from the standpoint of benefit, the widening of the underpasses would furnish more traffic capacity, which is now diverted to other streets (Tr. p. 85); that 10-foot traffic [fol. 24] lanes are satisfactory except where there are curves or heavy truck traffic, and then 11-foot lanes are a desirable minimum (Tr. p. 92); that buses are as wide as 104 inches; that truck maximum is generally 96 inches (Tr. p. 94); and he estimated that if the railway did not cross Washington Boulevard the street could be widened to the desired width for $111,750, that the proposed underpass structures would cost $812,750.00, making the difference due to the presence of the railway $701,015.00 (Tr. p. 99).

Ralph T. Dorsey, Principal Traffic Engineer of the City of Los Angeles, applicant's witness (Tr. p. 107), further testified that the percentage of trucks using East Washington Boulevard at the underpasses in 1950 was 9,474 passenger cars vs. 2,537 trucks, the ratio being approximately 26% trucks (Tr. pp. 110 and 113); that these trucks go generally either up the coast, to Sepulveda Boulevard, the Valley or the harbor; the center of gravity is Washington and Alameda, and from there the trucks move in four directions; Washington and Alameda is the center in relation to industry and the harbor, and is the focal point of truck traffic to the "four winds and from the hinterland" (Tr. p. 115); that if Washington Boulevard were widened, trucks and autos both would make more use of it; that Washington Boulevard underpasses are about 4,300 feet east of the intersection of Washington and Alameda.

Exhibit 27, introduced by this witness, shows the results of a traffic delay check on Washington Boulevard west of the underpass. He said that the largest percentage of trucks using Washington Boulevard are of a local nature; that the large trucks—or the greater percentage of them, [fol. 25] and the trailers, would be through traffic; the large trucks and the reefers come from the hinterland, bringing commodities to a point of distribution which centers at Washington and Alameda; from there they go to the four tradewinds—the harbor, industry and markets, and such (Tr. pp. 140-141). That on Alameda 38% of the traffic

is trucks; it is the main truck artery in the City (Tr. p. 143); that the large trucks that we are talking about are the ones that come from San Francisco or Portland, coming into the industrial area or harbor (Tr. p. 144).

He testified that if the underpasses under Santa Fe's tracks were enlarged, it was his opinion that more of the large trucks very definitely would use Washington Boulevard (Tr. p. 145); that at the present time there is a large turning movement to avoid the underpasses on Washington Boulevard, trucks and auto traffic avoiding these underpasses (Tr. pp. 146-147).

Exhibit 28, then introduced, shows the up-to-date accident record in and near the underpasses.

Robert C. Neil, interested party witness, traffic manager of the California Fruit Growers Exchange, testified that of 80,000 carloads of citrus fruit, 10% are handled by truck and the balance by rail; that transportation is the largest item of expense in marketing of the fruit; he expressed an interest in the conservation and preservation of railroad revenues, and urged the Commission to fix as the carrier's proportion of the construction cost of the enlarged grade separations an amount no greater than the value to be derived by Santa Fe (Tr. pp. 165-166).

F. G. Seig, interested party witness, the legislative representative of the California State Legislative Committee, [fol. 26] Order of Railway Conductors, testified that he had been authorized by the Brotherhood of Locomotive Firemen and Enginemen to represent that organization in the instant proceeding, as well as his own brotherhood; he called attention to the resolution of the Order of Railway Conductors declaring its responsibility to cooperate with all others interested in grade crossing elimination, on the basis of Federal Statutes limiting the costs to be paid by the railroads to 10%; that this resolution was adopted by 19 to 21 Railway brotherhoods; that another resolution thereof, adopted in 1950, called attention to the fact that highway transportation in many states was being subsidized by the high apportionment of costs of grade separations upon railroads, that the approach to this problem should be realistic and conform to the principles applicable to Federal projects (Tr. p. 171).

He stated his position that, in any case involving such cost apportionment, the amount to be paid by the railroad should be based upon the benefits received (Tr. p. 171).

Arthur C. Jenkins, protestant's witness, qualified as a consulting engineer with many years of experience in various phases of transportation problems (Tr. pp. 174-182):

At protestant's request, he said he had prepared an extensive report, which was introduced as Exhibit 29-RH, covering all the factors he considered important to the question of cost apportionment in grade separation cases; to prepare the report he had gone to numerous official and unofficial records, reports and analyses as listed on page A-35 of Exhibit 29-RH.

Explaining Exhibit 29-RH, Mr. Jenkins testified as follows: he had first considered the role of the railroad, which [fol. 27] was a newcomer in the transportation field in 1830, as one of an aggressor (Tr. p. 187); that at that time highway traffic was short and local in character, and the railroads were the first long-haul overland carriers, crossing existing highways with ponderous equipment, creating a danger to travel on the highways; that as time went on, the trend reversed, and highways became more extensive than the railway systems; population increased enormously, and the use of motor vehicles developed at even more rapid rate than the highway system (Tr. p. 190); that there came a time when rail transportation failed to keep pace in proportion with the increase in population and needs; and in California, particularly, highways increased between 1920 and 1949 a percentage of 596.9% (Tr. p. 191); early roads were single lanes, but in recent years have increased from two lanes to multiple-lanes, and the width of the lanes has increased from 7 feet to 12 feet; that vehicles using the highways have become longer, taller and wider (Tr. p. 192); he stated, further, that,

Whereas in the early days the railroad was extended across highways and created the accident hazard, that the railroad's lines have been established for many years without substantial change, and now it is the highway system that has taken the role of expanding and with resulting highways, superimposed upon railroads, and assuming the mantle of the aggressor (Tr. pp. 192-193); he said,

moreover, that speed and acceleration of traffic on the highway has increased, with the biggest change in character of commercial traffic on highways (Tr. p. 193); that with higher speeds on the highways, the tendency is towards more serious accidents; that the commercial vehicles, being larger, cause greater damage to rail equipment in accidents, [fol. 28] and to passengers and crew members; that fuel tank trucks create hazards (Tr. p. 194);

He stated, further, that with the shift of the role of aggressor from the railroad to the highway, there is also a shift in responsibility (Tr. p. 195); that traffic delay is a principal consideration in grade separations today; the seriousness of accidents and their number have not gone up in proportion to the increase of vehicles; that further programming of grade crossing elimination is due more to the desire to decrease the amount of traffic delay than it is due now to the accident hazard.

Table A-24, of Exhibit 29-RH, shows the decrease of accident casualties in proportion to motor vehicles registered.

That there are accepted engineering standards used to figure the cost of traffic delays, he stated; it amounts to 75 cents per hour for automobiles and $3.50 per hour for commercial vehicles; and in his opinion delay is the predominant factor in the instant proceeding (Tr. p. 198); that the increasing highway traffic has thrown a greater load on grade crossings, and the nature of the traffic has tended to increase the hazards (Tr. p. 201).

He said that economic studies have been made to show what the railroad derives in the way of economic benefits, and that has been done in proceedings before this Commission and others, the amount being capitalized as a basis for determining the allocation of costs; the benefit of such separations goes largely to the highway traffic (Tr. p. 201).

He stated that when the highways were established, and the railroads built over them, the railroad was the aggressor; but now the responsibility has been swinging in the [fol. 29] other direction, since highways in recent years have been superimposed over the rails (Tr. p. 202); that when the railroads must contribute to these structures, it is to their adverse interests because it expedites competitive

traffic and injures the railroads' competitive position as a carrier; that the passenger automobile has created a diversion of passenger traffic from the railroads; that, in the case of truck traffic, according to Interstate Commerce Commission records it costs the railroads 23 cents out of each gross revenue $1.00 to maintain and finance their right of ways, whereas the comparison with motor carriers is 3.7 cents (Tr. p. 204).

He explained that Chapter 1 of Exhibit 29-RH traces the development of highways (Tr. p. 205); that Table A-19 thereof shows the apportionment of funds from motor vehicle fees and fuel taxes, showing millions of dollars allocated to City streets (Tr. p. 208); that the cities get part of the Gas Tax Fund (Tr. p. 209).

On several different bases Table 11, page A-11 of Exhibit 29-RH, and subsequent exhibits, show the peak of railroad development to have been in the early 1920's (Tr. p. 210); that since then passenger traffic has been diverted to the automobiles, buses and highways, and rail traffic has shown a downward trend in relation to the increase in population, with respect both to volume of traffic and of passengers (Tr. p. 212); that failure of the railroads to grow with the population growth is explained principally by diversion of transportation from the rails to the highways (Tr. p. 213).

He stated that a widening of the underpasses at Washington Boulevard would result in increasing the cost to the railroad of maintaining a larger structure, increase the volume of automobile and commercial vehicles on Wash- [fol. 30] ington Boulevard, and result in no traffic benefits to the railroad (Tr. p. 215).

That trucks, due to their size and increased power, and slow rate of acceleration, tend to create a delay factor on highways; that the formula measuring this factor rates one truck as equivalent to approximately 2½ autos, on a straight, level road, and as equal to 5 autos, on a 3% grade (Tr. p. 218).

That Chapter 3 on Financing Highway Development, Exhibit 29-RH, shows the method of financing as between the use of public and private funds, and in recent years also from Federal funds partly (Tr. p. 225).

Chapter 4 relates to the shift from the rails to the highways for increased traffic; traces the development of long-haul trucking, weighs the loss of traffic from the rails to the highways (See Table 9, page A-9, Ex. 29-RH); and shows the tremendous increase in the volume of traffic carried by trucks, this increase from 1927-1948 nationwide (See Table A-19, said Exhibit) being from 44-billion ton miles to 87-billion ton miles, approximately doubled; that the net result of highway development has been of no benefit to the railroads (Tr. p. 229); that increasing the size of the underpass structures on Washington Boulevard would have no bearing upon the volume of traffic carried by the railroad (Tr. p. 233); that in 1910 there was approximately one truck to 47 automobiles, and in 1950 the ratio is one truck to 6½ automobiles (Tr. p. 234); that the railroads have lost practically all the short-haul traffic in metropolitan areas, and have lost passenger traffic to the automobiles (Tr. p. 235); that the average traffic pattern in California in 1942 shows trucks representing 11½% to 20% or more of the total vehicles on the highways (Tr. p. 240).

[fol. 31] That from 1935 to 1949 the total number of railroad grade crossings has decreased, due to abandonments and elimination of crossings (Tr. p. 241).

Mr. Jenkins testified that Chapter 5 of Exhibit 29-RH traces the early period of development of the two modes of transportation; that years ago the railroads moved high-speed heavy equipment across highways, coming in contact with nothing larger than animal-drawn vehicles; that in recent years the character of highways has developed with increased volume of traffic thereon, permitting accidents between the railroads and heavy equipment on the highways, including tank trucks that could cause serious damage to the railroad.

Mr. Jenkins' conclusion, however, is that the problem of eliminating grade separations is not so much one of considering the accident hazard, as it is a matter of expediting traffic flow (Tr. p. 245).

That regulatory bodies can undermine the soundness of the railroad carriers, by placing on them arbitrary costs of grade separations; that in California, it has been estimated

by the Commission in case No. 4136, it would cost approximately two and one-half billion dollars to eliminate all railroad crossings; there is no practical way in which the cost of any specific grade separation crossing can be passed on by the railroad to its customers through the adjustment of rates, unless similar adjustments were made on the competitive, highway transportation (Tr. p. 250). The trend is still towards construction of highways and the expansion of their capacity. In contrast, the railroads over a period of years, on the average, have been on the decline (Tr. p. 251). In 1926, railroads handled 81.9% of the total rail and bus mileage in the country; in 1941, the rail propor- [fol. 32] tion had decreased to 68.3% (Tr. p. 252).

In the early period of our history, highways served largely as feeders to the railroads. Today, highways operate as the arteries of competitive traffic, and competition has taken over practically all types of transportation from the railroad within a distance of 50 miles from the larger cities (Tr. p. 253).

Chapter 6 of Exhibit 29-RH, Mr. Jenkins explained, presents a comparative study of the importance of grade-crossing accidents to other accidents, generally, and tends to show that percentagewise grade-crossing accidents have decreased, in proportion to automobiles and trucks registered, and constitute an extremely small percentage of all highway accidents (Tr. p. 260).

Chapter 7 thereof (Tr. p. 262) analyzes the cost of grade separations constructed in California; and shows that from 1910 through 1916, railroads carried the major proportion of cost of such separations; but in more recent years political subdivisions have been carrying practically all of the costs. (See page 62, and Table 21, Exhibit 29-RH, showing the number of grade crossing separations constructed up to 1931, and apportionment of the costs.)

In 1916, when the automobile came into the picture, the trend went over to allocations of larger amount of the costs to the public. The cost of individual grade separations has increased enormously, due to increased cost of labor and materials, and to the type of structures required to be built; that in early days a simple structure was used, but now the walls are no longer vertical and are set further

from the roadway, sidewalks are provided, and wide islands in the center of the roadway are built to accommo- [fol. 33] date change in the type and speed of vehicles using the highways (Tr. p. 264).

[Compare Table 28, page A-29, Exhibit 29-RH.]

Chapter 8, entitled BENEFITS TO RAILROADS FROM GRADE CROSSING SEPARATIONS, Mr. Jenkins testified (Ex. 29-RH, p. 68) analyzes results of studies in other states. He referred to the *Goshen Junction* case, decided by the Commission, in which the decision was rendered on the basis of capitalizing the financial benefit to the railroad, and assessing the railroad, out of a total cost of $340,000.00, the sum of $15,000.00 as the railroad's share. Summarizing the results in several other states, studies reveal four per cent of the cost to be the benefit derived by the railroad from the separation of grades (Tr. p. 270).

Chapter 9 (at Tr. p. 271) is a summary of state practices on cost allocations in other states. Those states allocating 50% of the cost to the railroads are primarily the Southern states; those allocating 25%, or less, are primarily the industrial and thickly-populated Northern states. States adopting legislation in recent years have decreased the amount allocable to the railroads for new grade separations to a maximum of 10% to 25% (Tr. p. 273).

Mr. Jenkins (commencing at p. 275 of Transcript) explained the tables in the appendix of Exhibit 29-RH. These are largely self-explanatory.

Exhibit 30-RH (Tr. p. 280) shows that in 1949 steam railroads in California received 20.9% of the gross revenue for the transportation of property, and the highway carriers, 73.7%. In 1938, those percentages were 27.8% for the railroads, and 65.9% for the highway carriers . . . and [fol. 34] this during a period of war, when there were limitations on truck transportation and use of gasoline and tires.

Exhibit 31-RH (Tr. p. 284) shows cost apportionment in California of grade separation projects for the years 1920 to 1948.

In the City of Los Angeles, the principal East and West street South of Washington Boulevard is Manchester;

North of Washington Boulevard, the principal East-West street is Olympic Boulevard (Tr. p. 291); and Mr. Jenkins observed that Washington Boulevard carries a heavier proportion of truck traffic than does Olympic Boulevard—which is a state highway; that Washington is the principal truck route East and West; that an origin-destination check can be made by pasting a sticker on the windshield and then counting vehicles with stickers passing a designated point; that this could be done to determine whether Washington Boulevard is carrying traffic from a specific point near the edge of the city through the underpasses;

That, from observation, there does not appear to be any difference in the use made of Washington Boulevard with respect to the amount of truck traffic, from the use made of the state highways (Tr. p. 298).

Mr. Jenkins recognized that the railroads receive an advantage where the hazard to the train is eliminated by separation of grades (Tr. p. 325); said that it is difficult to pass on the cost of grade separations by increasing railroad rates, because if such rates were increased the trucks would have a competitive advantage and traffic would be diverted to them (Tr. p. 327); that the railroads receive benefits from eliminating grade separations by eliminating [fol. 35] delays; the delay factor can be measured as it was in the *Goshen Junction* case, pursuant to the Johanson formula developed in a textbook and showing the material value upon a delay to highway traffic (Tr. p. 332);

That railroads should be given priority at grade crossings because highway traffic is continuous whereas railroad operation is relatively infrequent (Tr. p. 334), and because railroads would block more than one intersection if stops were made for traffic signals, and trains are too heavy to accelerate rapidly to clear traffic signals following a complete stop (Tr. p. 336); that highway traffic has increased to such an extent it has "thrown the balance," shifting the obligation now that highway traffic is bigger than rail operations (Tr. p. 337). In figuring benefits derived by railroads from separations, as for instance, in Michigan, maintenance, protection costs, and the costs of accidents were all taken into consideration (Tr. p. 338).

Leo E. Sievert, protestant's witness, the Executive rep-

resentative of the President of Santa Fe, introduced Exhibit 35-RH, which shows the rate of return of Class One railroads and of the Santa Fe, Union Pacific and Southern Pacific, according to figures taken from Interstate Commerce Commission records. The average return for all railroads for a period of 20 years was 3.202; the average for Santa Fe was 3.552 for the same period; for Southern Pacific, 2.735; and for the Union Pacific, 3.2325. During the past 20 years the railroads have not enjoyed a satisfactory, nor adequate, return on their investment (Tr. p. 360);

That there has been a noticeable trend in the handling of freight traffic, in that the short haul, inter-city business [fol. 36] of non-bulky commodities has disappeared from the railroads, and has gone to the trucking industries. Higher rated commodities are being taken increasingly by the trucks, and hauled in interstate commerce (Tr. p. 368). The effect of an extensive grade-crossing separation program, to which the railroads would be compelled to contribute, would be to place a financial burden on the railroad industry and affects its competitive situation (Tr. p. 370);

That the Santa Fe Transportation Company operates in California handling intrastate freight; and subsidiaries have certain interstate operations in other states (Tr. p. 384);

That the price of Santa Fe stock on the market was below 100 in 1941, and was 169 in January of 1951 (Tr. p. 388); that the Santa Fe is a well-operated railroad and has a good future, if it is not hampered with too many costs (Tr. p. 389); that from 1942 onward the financial return to the Santa Fe has been quite a bit greater than during the previous ten or twelve years; this is explained by reason of the war and the Rearmament Program, and is partly attributable to increase in population in this area (Tr. p. 391);

That (according to Mr. Sievert) only benefits that are tangible should be considered in assessing costs in a grade separation project against the Santa Fe; and intangible benefits, such as general welfare of the community, should not be included (Tr. p. 392);

That increased rate of return is not dependent on a new

overpass at Washington Boulevard; it depends on efficiency of the Santa Fe, in operating 13,000 miles of track in 13 states; that Santa Fe's operations could be conducted just as satisfactorily with the existing structures, over Wash- [fol. 37] ington Boulevard, as they could be with any anticipated structures, and there would be no benefit to the Santa Fe (Tr. p. 394).

Arthur C. Jenkins, on further cross-examination (Tr. p. 403), testified that the benefits theory—of determining the proportion of costs to be assessed to the railroad—is subject to determination arithmetically as to the benefits involved (Tr. p. 410); he also testified, although the total freight handled by railroads is not as great percentagewise as it was, the tonnage handled by the railroads has increased, but it has lagged considerably below the rate of increase of population (Tr. p. 411);

That the railroads have developed larger cars, and more powerful locomotives (Tr. p. 417);

That if the City put in a grade crossing over the tracks at Washington Boulevard, the Santa Fe would suffer a detriment, since a grade crossing presents a hazard—regardless of the type of protective devices there; that motor vehicles may crash even through automatic gates, which are the best type of protection; but the situation as it presently exists is no detriment to the railroad, because the grades are separated now (Tr. p. 420);

That the detriment or corresponding benefit where a grade crossing was eliminated would amount to 4% or 5% of the cost, or a maximum of 10%, assessable to the railroad (Tr. p. 421);

That cities get a considerable proportion of the total return from the gasoline tax which is passed by the State to the cities for street work (Tr. p. 427).

If the Santa Fe were assessed on a benefit basis, it would not make any difference what type of structure was built.

[fol. 38] Under the Federal rule where no crossing is closed in the building of a grade separation no cost is assessed the railroad, nor is there any cost assessed against the railroad where a separation structure is enlarged. Up to 10% may be assessed against the railroad where a grade

separation results in a closing of a grade crossing (Tr. p. 429).

You can calculate the amount of monetary benefit to be derived from a grade separation and the highway user gets the most benefit (Tr. p. 434).

There should be no distinction regarding the amount assessed to any of the parties on the basis of the ability to pay (Tr. p. 442).

When the railroad has an increase in railroad traffic demand that necessitates the building of additional tracks the witnesses benefit theory would place all the cost on the railroad for any additional trackage. Here the benefit being with the highway user, it makes no difference whether the source of funds is the city or any other governmental agency (Tr. p. 443).

The State Gas Tax at 4½c per gallon is divided so that five-eighths of a cent goes to the cities for city streets (Tr. p. 448), the same being allocated on a population basis.

William F. Martins, General Foreman in charge of Bridge and Building Department for the Santa Fe at Los Angeles (Tr. p. 451), testified that in 1914 there was no grade crossing of public streets across the Santa Fe tracks where Washington Boulevard now is. Also, there was no street in the vicinity (Tr. p. 457). This witness was foreman of the work of building the existing underpasses.

[fol. 39] Frank H. Hitchcock, a witness for Santa Fe and the General Claims Agent at Los Angeles, testified that there has been no claim loss on account of accidents at the existing underpasses, and no cost for property damage or personal injuries have been paid by Santa Fe (Tr. p. 458).

A survey of the cost of grade crossing accidents in California from 1947 through the first ten months of 1950 shows that the average accident costs the Santa Fe $163.50 (Tr. p. 459 and 471). This figure takes into account principal payments and legal expenses, not the cost of investigation.

Costs of accidents at crossings comparable to Washington Boulevard which are street grade crossings are shown in Exhibit 37-RH (Tr. p. 461). These four crossings picked at random show no claim cost. Five other crossings considered comparable to Washington Boulevard where there

are grade separations now, were studied for their claim record for five years preceding the construction of the grade separation. Claim costs are shown in Exhibit 38-RH. (Tr. p. 462).

Rural crossings where there is a combination of heavy traffic and high speed result in the worst accidents, in the experience of this witness, who has been in the claim business for 45 years (Tr. p. 464).

The hazard of damage to trains has increased many fold in recent years. Years ago trains seldom struck anything but a horse and buggy and pedestrians. Now tank trucks and heavy vehicles cause disastrous wrecks and derailments primarily due to the increased size and width and character of highway vehicles. However, grade crossing protection [fol. 40] has materially improved in recent years (Tr. p. 465).

There were 1186 accidents from 1947 through the first 10 months of 1950 on the Santa Fe's 1620 crossings (Tr. p. 466).

The average accident with an automobile does not damage railroad equipment. Accidents with trucks, road rolling machines, and commercial-type vehicles do cause damage to railroad equipment (Tr. p. 471).

Busy travelled city street crossings definitely cause considerably less loss from accident than country crossings (Tr. p. 472).

O. L. Gray, General Manager for Santa Fe, testified that there are seventeen scheduled passenger train movements and sixteen to twenty-two freight train movements daily over Washington Boulevard. It is his opinion that Santa Fe will receive no increase in business from enlarging the existing bridges; that, if anything, such construction would enhance the trend for diversion of traffic to the trucks, a definite trend over past years. The present bridges are sufficient for railroad purposes and will remain adequate for the foreseeable future (Tr. p. 474).

It is impossible to pass the costs of a specific project such as this by increasing rates, although the railroads' shippers will eventually have to stand the costs. There are frequent calls for the railroad to contribute to the costs of such

structures in other states. The effect of such contributions is to make it more difficult to meet competition (Tr. p. 476).

Freight trains over Washington vary in content from ten to one hundred cars. Their speed does not exceed fifteen miles per hour (Tr. p. 480).

[fol. 41] There has been substantial increase in business in this area since 1900 freightwise but not passengerwise. Including military trains, Santa Fe trains carry 1,000 to 1,200 persons daily over Washington Boulevard (Tr. p. 482).

Crossing accidents cause considerable expense and delay. For example at Azusa a gasoline truck collided with the Super Chief doing approximately $150,000.00 damage including claim costs, and delayed the train about two hours (Tr. p. 483).

One crossing accident out of twenty-five or thirty may damage a train, the damage usually consisting of damage to foot boards or handholds or ladders. A small proportion of the accidents cause damage to other equipment. Perhaps one out of fifty or sixty accidents may cause a derailment (Tr. p. 489).

Accidents usually cause only a few moments delay (Tr. p. 490).

Fewer trains are operated today than twenty years ago because the *Deisel* locomotives handle more tonnage and more cars; however, the tonnage handled is up (Tr. p. 491).

The present underpasses do not require any repairs, just normal maintenance (Tr. p. 493).

Demand is being made on Santa Fe in another California County for seven or eight grade separations involving eight or ten million dollars (Tr. p. 494).

Donald M. Baker, Installing Engineer, Ruscardon Engineers, Los Angeles, testified to making a traffic count at Washington Boulevard as shown in Exhibits 39-RH, 40-RH [fol. 42] and 41-RH. In these exhibits "I.C.C." indicates trucks or vehicles with a tag indicating they were operating under the Interstate Commerce Commission. Full trailer means trucks with a complete trailer attached. Pick-up trucks and panel body trucks were included in the count of passenger cars. No trucks were counted twice in any column except the total (Tr. p. 501).

Because it was muddy it was difficult to see all of the I.C.C. signs. Also they were on various places on the trucks (Tr. p. 503).

Generally speaking, there was about one truck for every four passenger cars (Tr. p. 503).

Henry D. Lynch, Civil Engineer, actually supervised the truck check. He testified to the difficulty of seeing all the I.C.C. markers. About 1% of the traffic was actually counted as bearing I.C.C. tags (Tr. p. 513).

John M. Terras, Bridge Engineer, Santa Fe, testified that the railroad bridges over Washington Boulevard originally were built to a fourteen-foot vertical clearance and that such bridges do not tend to settle. The Cooper Loading for the Harborline bridge is E56 or 60, that is on a mainline track bridge E65, the latter being the present standard. The Accounting Department depreciates such bridges over a period of fifty years but that does not represent the life of the bridge. Bridges are renewed largely due to obsolescence rather than structural failure and these bridges are good for possibly another fifty years (Tr. p. 522).

[fol. 43] It is stipulated that the railroads mentioned in Exhibits 50, 51, and 52-RH are predecessors in interests of the Santa Fe (Tr. p. 529).

Harry Silk, Jr., Manager of the Metropolitan Transit and Traffic Department, Los Angeles Chamber of Commerce, testified that the committee of that Department concluded that a six-lane roadway with adequate sidewalks and vertical clearance is desirable and that the Chamber of Commerce takes the position that Washington Boulevard is one of the major east-west arteries continuous across the City and County (Tr. p. 532).

John C. Crowley, representative of the League of California Cities, testified and placed a resolution of the League in evidence dated March 16, 1951, Exhibit 53-RH (Tr. p. 538).

George Langsner, East District Engineer in charge of Design in the Los Angeles Metropolitan Area, Division of Highways, testified that there will be a grade separation between the Santa Ana Freeway and Washington Boulevard; that Washington Boulevard is a so-called primary or major highway built to major highway standards (Tr. p. 559).

It is not good engineering practice to narrow a six-lane highway to two lanes or four lanes (Tr. p. 562).

Washington Boulevard carries approximately ten thousand cars and trucks a day. The underpasses under Santa Fe tracks are approximately five miles from the Anaheim-Telegraph-Washington Boulevard crossing (Tr. p. 564). [fol. 44] F. A. Burt, Chief Executive Road Commissioner, Los Angeles County, testified regarding present standards of highway construction and his testimony is not in issue here (Tr. p. 569).

Harold O. Springer, recalled as a witness, testified that the present vertical clearances between the surface of Washington Boulevard and the underpass are 13.52 feet and 13.24 feet (Tr. p. 573). He introduced Exhibit 61-RH and stated that the Cooper Load Rating for the average railroad bridge has been E55. Subsequently in 1925 specifications for steel rail bridges required an E60 rating and by 1943 an E72 rating was recommended (Tr. p. 581). These increases are due to increased loading on the rails themselves and is more costly construction than formerly (Tr. pp. 582, 583). Similarly there has been an increase of load standards for highway bridges in about the same ratio as for railroad bridges (Tr. p. 584).

Hugo H. Winters, recalled, testified that the accidents as shown by Exhibit 28 occur partly because of the tapering of the roadway from 77 feet to the 20 feet underpasses. The exhibit shows all the accidents reported to the police department (Tr. p. 586). A number of the accidents are some distance removed from the underpasses and result from changes in size of the roadway and also from the sharp curves (Tr. p. 588).

Exhibit 62-RH is a land use map in the area of the underpass (Tr. p. 589).

[fol. 45] Memorandum of Points and Authorities—Filed July 24, 1952.

I.

Statement of the Case and the Ruling of the Commission.

The Santa Fe respectfully applies for a writ of review for the purpose of testing the lawfulness of Decision No.

47344 of the Public Utilities Commission dated June 24, 1952.

On June 4, 1948, the City of Los Angeles filed an application No. 29396, with the Public Utilities Commission, seeking authority to enlarge two existing grade separation structures on Washington Boulevard below petitioner's tracks between Soto Avenue and Santa Fe Avenue in the City of Los Angeles. After public hearing, the Commission rendered Decision No. 43374; thereafter both the City [fol. 46] and the Railroad applied for a rehearing which was granted and it is from the decision on rehearing to review which Santa Fe requests this writ be issued. In the decision the Commission authorized the City to construct the enlarged grade separation structures and apportioned 50% of the cost of the structures to the Santa Fe.

Petitioner seeks this writ of review on the ground that the Public Utilities Commission unlawfully, arbitrarily and unreasonably and unconstitutionally exceeded its authority, arbitrarily assessed the amount and assessed an excessive amount depriving Santa Fe of its constitutional rights both under the Constitutions of the United States and the State of California as will be set forth more particularly hereafter.

II.

Summary of the Evidence Considered Pertinent to the Constitutional Issues.

The following is a brief summary of the evidence which petitioner considers is pertinent to the constitutional issues raised herein, bearing in mind that the abstract set forth in the Appendix is a more complete review.

There are two sets of railroad tracks that cross Washington Boulevard approximately 200 feet apart leading to a junction just north of Washington Boulevard. These two sets of tracks cross over Washington Boulevard on railroad bridges constructed in 1914. The eastmost tracks carry the Santa Fe's third district main line to the east and San Diego while the tracks on the west carry Santa Fe's lines to Los Angeles Harbor. These railroad lines [fol. 47] were placed in operation by Santa Fe's predecessor in 1887 and 1888 respectively.

In 1914 these railroad lines consisted of three tracks crossing the area now known as Washington Boulevard at grade. By contract between the City and the Santa Fe the two presently existing underpass structures, each 20 feet wide, were constructed to give the City garbage trucks easier access to the garbage disposal plant. The City and Santa Fe by agreement each paid half the costs. Until 1914 there was no open street at or near the present location of the underpasses.

In 1926 Santa Fe required additional rail facilities over its main line to the east and, therefore, built at its sole expense an additional superstructure for another track over the main line crossing of Washington Boulevard. Thus both underpasses carry two tracks at this date. In 1931 the City of Los Angeles constructed a bridge across the Los Angeles River just east of the underpasses and opened Washington Boulevard as an arterial street from the ocean in the west to Whittier Boulevard east of the City.

The present underpasses carried only local traffic until the Los Angeles River bridge was built in 1931. Since then the traffic on Washington Boulevard has increased to a point where applicant's witnesses state that a 6-lane highway is necessary to carry the traffic, pointing out that the registration of vehicles and population have both increased tremendously in recent years. At the present time Washington Boulevard carries approximately 10,000 vehicles daily through the existing underpasses. The narrowness of the underpass structures creates a hazard, particularly to large trucks which may scrape the sides of the structures and to trucks taller than the vertical clear-
[fol. 48] ance. It is admitted that the evidence is sufficient to support a finding that the underpasses should be enlarged.

Washington Boulevard is described by all witnesses as a primary arterial highway crossing the city and county and is one of the most important east-west streets and highways in the city and county of Los Angeles. The center of gravity for truck traffic in the City of Los Angeles is the intersection of Washington Boulevard and Alameda Boulevard about 4,300 feet west of the underpasses, and from and to which point commercial traffic fans out to the

harbor, the industrial district, and the hinterland. Alameda carries approximately 38% trucks. Washington Boulevard approximately 25%. A number of trucks using Washington Boulevard bear Interstate Commerce Commission numbers and the large trucks using the street are considered to be through trucks from distant cities. Also, it is anticipated that more trucks would use Washington Boulevard when it is widened and improved as planned.

The large existing underpasses would benefit the highway user by decreasing the amount of delay to vehicles, an important if not the most important factor in grade crossing separation projects. When widened Washington Boulevard will be an important feeder for traffic to the new freeways and proposed bus routes and will relieve congestion from parallel streets. It is necessary to build new underpasses higher and wider to accommodate the tremendous increase in the flow of traffic. Also vehicles using highways have become wider and taller and move faster, requiring wider lanes and taller bridges, and particularly is this true where there is a large proportion of trucks mixed with automobile traffic.

[fol. 49] In 1932 the Public Utilities Commission (then the Railroad Commission) authorized the City to construct two 56-foot bridges at the location of these underpasses and apportioned 25% of the cost to the Santa Fe. The City now proposes 90-foot wide underpasses to accommodate 6 traffic lanes.

The Federal Government by a policy memorandum covering federal highways assess railroads with a maximum of 10% of the cost of grade separation structures on the basis of the benefit the railroads receive from the construction of grade separations. Where no crossing is closed or a separation structure is enlarged, the Federal policy is to assess no part of the cost to the railroads on the basis that no benefit is received by them.

Santa Fe's witnesses testified that enlargement of the proposed underpasses would be an actual detriment rather than a benefit, first, because of the increased maintenance costs of larger structures and, second, the improvement of a right-of-way for competitive truck traffic, and third, that the cost of contributing to such construction will make

it more difficult for the railroads to compete with the highway carriers.

The existing underpass structures have an estimated 50 years of remaining life. Prior to 1925 they complied with the then existing engineering standards known as Cooper ratings and were built to the same standard as practically all existing structures. Successively in 1925 and in subsequent years these standards have been increased to provide for heavier railroad loadings and to accommodate increased height of trucks. The uncontradicted engineering testimony is that no repairs are needed to the existing structures and only nominal maintenance is required.

[fol. 50] A railroad shipper and a union official testified in favor of the adoption of a benefit formula so that first, the cost of such structures as the ones herein proposed would not have to be ultimately borne by the shippers, and second, so that the competitive position of the railroads would not be impaired. It was further testified that 19 of the 21 operating Railroad Brotherhoods have passed resolutions in accord.

A consulting engineer compiled an extensive report, Exhibit 29-RH, in which he considered the multiple problems in apportioning costs of grade separation structures. He testified that originally the railroads were constructed over existing highways that handled local traffic. In the early days the railroads were the first long-haul carriers, tended to be monopolistic, and with their ponderous equipment a hazard to horse-drawn vehicles and pedestrians on the highways. Since then population and the use of automobiles and trucks have more than kept pace with the rapid development of inter-city and transcontinental highways. By 1920 the railroads ceased to expand and failed to grow in proportion to the increase in population. In the past 40 years highways have reversed the trend and have expanded over and across the existing railroads and now handle fast cross-country traffic. The types of vehicles have changed from wagon and buggy to huge ponderous trucks of all types. Delay to traffic on the highway has become the principal consideration in eliminating grade crossings with railroads. Grade crossing accidents have diminished in comparison with numbers of vehicles registered as a re-

[fol. 51] sult of better crossing protection and now are a very small percentage of accidents on the highways.

It is possible to figure mathematically the economic values of the benefits to be derived from constructing grade crossing separations. It is a formula in which the cost of delay to motor vehicles and the cost of accidents can be evaluated.

This witness also testified that paying the part of the cost of grade separation structures injures the railroads from a competitive standpoint and it furthers the diversion of transportation business from the rails to the highway. He pointed out that Interstate Commerce Commission reports show that it costs the railroads 23¢ out of each gross revenue dollar to provide for their right-of-way and in contrast that it costs the commercial trucking industry only 3.7¢. Moreover, the reports show that trucks have taken a large portion of the long-haul traffic and nearly all of the short-haul traffic from the railroads.

This witness also traced a trend indicating that before the advent of the automobile the railroads paid nearly all the costs of grade separation and that in more recent years state and political subdivisions and the Federal government have been carrying an increasing proportion of the cost; that states passing recent statutes on the subject have decreased the proportion of the cost to be borne by the railroads to from 10 to 25%. He also pointed out that grade separation structures today are more elaborate edifices made necessary by multiple lane highways and faster [fol. 52] mixed traffic and larger vehicles. His conclusion is that the necessity for separating the grade of highways and railroads is not so much to eliminate the accident hazard as to expedite highway traffic.

Other witnesses testified that the calling upon the railroads to bear a substantial portion of the cost of grade crossing separations would be a heavy burden on the railroads. The rate of return for the past 20 years in relation to the value of railroad investment and replacement costs has not been adequate. The imposition of such costs make it more difficult for the railroads to compete with other forms of transportation. Although tonnage handled by the railroads has generally increased, the number of trains

particularly over Washington Boulevard has not increased due partly to the greater motive power of diesel locomotives and larger cars and longer trains.

Accidents have occurred at the existing underpasses because vehicles, particularly trucks, have struck the sides of the structures and the top. Other accidents near the underpasses have occurred because of the narrowing of the roadway and because of the curvature. However, with the exception of accidents between railroads and tank trucks or large vehicles, trains are seldom derailed and damage to railroad equipment is relatively small. The Santa Fe has sustained no loss and there have been no claim costs for either personal injury or property damage from any accident at the presently existing underpass structures at any time.

[fol. 53] III

The Court Should Exercise Its Judgment on the Law and the Facts in Reviewing the Validity of the Commission's Decision.

The principal issues presented in this matter arise under the Constitution of the United States. Because of this situation the court's attention is directed to the problem that where issues involving the Constitution of the United States in grade separation matters the Supreme Court should exercise an independent judgment upon both the law and the facts. It seems proper that this matter be considered here since this case is considered by the parties and the Commission as a test case.

There are three phases of this problem. The first involves the extent of the review of points of fact involving the Constitution of the United States; the second involves the extent of the review of the findings of fact involving the Statutes and Constitution of the State of California; and the third involves the extent of review of questions of mixed law and fact.

The *first* phase of the problem is that the Supreme Court of the State of California should exercise an independent judgment of the law and facts as to points involving the Constitution of the United States in reviewing the validity

of the Commission's decision. This is a requirement that arises under the due process clause of the Constitution of the United States.

Bluefield Water Works Co. v. Public Service Commission of the State of W. Va. (1922), 262 U. S. 679, 67 L. Ed. 1176;

[fol. 54] *Ohio Valley Water Co. v. Ben Avon Borough* (1920), 253 U. S. 287, 64, L. Ed. 908.

The matter is well summed up in the case of *Lone Star Gas Co. v. City of Fort Worth, Tex.* (1936), 15 Fed. Supp. 171, 176, as follows:

> "As to the question of arbitrariness and unreasonableness, as stated above, the due process clause of the Fourteenth Amendment justifies a complainant in demanding the independent judgment of the court as to both law and facts. *Bluefield Water Works & Improvement Company v. Public Service Commission*, 262 U. S. 679, 43 S. Ct. 675, 67 L. Ed. 1176."

The review to which petitioner is entitled as to points arising under the Constitution of the United States includes an independent judgment upon both the law and the facts, and this is true whether the action of the Commission is quasi judicial or legislative. Further, this right to an independent review of the facts cannot be limited by a state statute.

American Toll Bridge Co. v. Railroad Com. (1938), 12 Cal. 2d 184, 191-4;

Southern California Edison Co. v. Railroad Commission (1936), 6 Cal. 2d 737, 744, 59 P. 2d 808.

and the above cited cases set forth the extent of the review required by the court.

This independent review of the facts to which petitioner is entitled was clearly stated in *Nashville, C. & St. L. R.* [fol. 55] *Co. v. Walters* (1934), 294 U. S. 405, 415-16, 428, 79 L. Ed. 949, 956, 963, as follows:

> "First. Unless the evidence and the special facts relied upon were of such a nature that they could not conceivably establish that the action of the state in

imposing upon the Railway one-half of the cost of the underpass was arbitrary and unreasonable, *the Supreme Court obviously erred in refusing to consider them.*" (Emphasis added.)

and

"Second. The Supreme Court of Tennessee erred in refusing to consider whether the facts relied upon by the Railway established as arbitrary and unreasonable the imposition upon it of one-half the cost of the underpass."

Compare Section 1760 of the Public Utilities Code (added to the Public Utilities Act of 1915 in 1933 as the last paragraph of Sec. 67, stats. 1933, Ch. 442, pp. 1157, 1158), and *Southern Calif. Edison Co. v. Railroad Com.* (1936), 6 Cal. 2d 737, 750.

The *second* phase of this problem is that the Supreme Court of the State of California need only determine as to points involving the Constitution of California that substantial facts support the validity of the Commission's Decision.

Section 1757 of the Public Utilities Code (and Public Utilities Act of 1951) was based on former Section 67 [fol. 56] of the Public Utilities Act of 1915. Section 1757 in part is as follows:

"* * * The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review except as provided in this article. * * *"

The extent of review by the Supreme Court of decisions of the Public Utilities Commission in matters not involving the Constitution of the United States as well stated in 2 Cal. Jur. 2d 382, as follows:

"* * * the public utilities commission's findings of fact are, like the findings of a court or general verdict of a jury, final only when supported by substantial evidence." (See cases cited at Note 14.)

and again at 2 Cal. Jur. 2d 381:

> "it has been repeatedly ruled that where a finding made by the commission is without supporting evidence, it is an abuse of discretion, and an award based thereon will be annulled by the courts."

See also:

Southern Pacific Co. v. Railroad Com. (1939), 13 Cal. 2d 125.

The *third* phase of the problem is that the Supreme Court of the State of California should exercise an independent judgment to ascertain that the questions of law have been correctly decided in questions of mixed fact and law. This [fol. 57] matter requires a study of the facts and was well summed at 2 Cal. Jur. 2d 372, as follows:

> "* * * In general, where what purports to be a finding on a question of fact is so involved with and dependent on questions of law as to be in substance and effect a decision of law, the court will, in order to decide the legal question, examine the entire record, including the evidence if necessary.
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> * * * * * * * * *
>
> "The most important class of questions of mixed law and fact are those arising upon so-called issues of constitutional or jurisdictional fact, or fundamental facts bearing on constitutional or jurisdictional issues. With respect to constitutional facts, for instance, the courts may consider the evidence presented in a proceeding in order to determine whether an administrative decision or order violates any right of a party under the state or federal constitution, even where the proceedings are before an agency enjoying special constitutional status whose determinations are otherwise subject only to a limited review. The rule that the administrative determination of facts bearing on constitutional rights of a litigant, even though supported by evidence, is not conclusive on the court, and that the court will exercise its own independent judgment on the evidence, is typically applied where rates

found by an administrative authority to be reasonable are attacked as confiscatory and the court makes its own determination as to the value of the property involved."

[fol. 58] IV

The Decision Is an Excessive, Arbitrary and Unreasonable Assessment of Costs in Violation of the Santa Fe's Constitutional Rights.

In making its order in Decision No. 43744, the Commission deprived Santa Fe of its constitutional rights to substantive and procedural due process and equal protection of the laws and required it to pay a large sum of money, taking its property, without just compensation in violation of the Constitution of the United States, Fifth and Fourteenth Amendments and in violation of the California Constitution, Article I, Sections 13 and 14.

The protection of the Fourteenth Amendment to the Federal Constitution against orders requiring railroads to eliminate grade crossings at unreasonable expense is real, and not to be lightly regarded.

Lehigh Valley Rd. Company v. Board of Public Utility Commissioners (1928), 278 U. S. 24, 73 L. Ed. 161, 167.

1. The Safety Factor—There Is no Substantial Evidence in the Record to Support the Decision Apportioning so Large a Percentage of the Costs Upon the Railroad.

In the instant case the authority of the Public Utilities Commission is derived from the California Constitution, Article XII, Sections 22-24, and from the Public Utilities Code, see Sections 1202 and 1214. The Commission's authority is not absolute. The Commission must not and cannot constitutionally assess any proportion of the costs of a grade separation to the railroad arbitrarily or unreasonably or simply because in the exercise of its police power it is able to say that to some extent or to any extent public safety requires the construction of larger under- [fol. 59] passes. Exercise of the police power must be devoid of oppression and must not amount to an improper or arbitrary infringement upon constitutional rights.

5 Cal. Jur., Sec. 106, p. 695.

In *Archer v. City of Los Angeles*, 19 Cal. 2d 19, at pages 23-24, it is said:

> "The state or its subdivisions may take or damage private property without compensation if such action is essential to safeguard public health, safety, or morals. (*Gray v. Reclamation Dist.*, 174 Cal. 622.) (Citing cases.) In certain circumstances, however, the taking or damaging of private property for such a purpose is not prompted by so great a necessity as to be justified without proper compensation to the owner. (*Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393 (43 Sup. Ct. 158, 67 L. Ed. 322); *Chicago B. & Q. R. R. Co. v. Chicago*, 166 U. S. 226 (17 Sup. Ct. 581, 41 L. Ed. 979).)"

The police power is subject to constitutional limitations therefore: One, that it may not be exerted arbitrarily or unreasonably; two, that when particular individuals are singled out to bear the cost of advancing public convenience, the imposition of costs must bear some reasonable relation to the evils to be eradicated or the advantages to be secured

Nashville, C. & St. L. R. Co. v. Walters, 294 U. S. 405, 79 L. Ed. 949, at pages 955 and 963, respectively.

In the instant proceeding the "evil to be eradicated" is the danger that trucks which have become wider and taller may hit the underpasses; the "advantages to be secured" are elimination of delay to vehicular traffic.

[fol. 60] If the Commission's decision is based upon its police power its order is on its face an arbitrary exercise of that power. It fixes the railroad's share of the cost in round figures, 50%. Nowhere either in the evidence or in the Commission's opinion is there any indication that the Commission figured this percentage on any logical or reasonable basis; from all appearances it was literally plucked out of the air as the Commission's idea of rough justice, based upon unknown standards, outside the record, rather than upon up to date technics of calculating the value of benefits of accident elimination. If the Commission's decision is to have a rational basis the value of promoting

public safety can be calculated with a reasonable degree of accuracy. The Commission did so calculate in its decision in the *Goshen Junction* case (1933), 38 C. R. C. 380, wherein the sum apportioned to the railroad in a proceeding resulting in closing of not one but two grade crossings was arrived at by capitalizing an amount measuring the annual benefits and privileges received by the railroad on a 6% basis. The result of this calculation was to charge $15,000.00 to the railroad and $340,000.00 to the public authorities (Tr. p. 296).

The Santa Fe respectfully urges the Court to consider that this monetary value can be figured on a reasonable mathematical basis, as the Commission did in the *Goshen* case, *supra*, and need not be arbitrarily guessed or assessed in round percentage figures (see Tr. pp. 198, 201, 269, 298, and 410). Moreover, the Public Utilities Commission has sizeable funds (see Budget Act of 1950, Statutes of California, Chapter 2, p. 310, and Budget Act of 1951, Statutes of California, Chapter 1920, p. 2706) appropriating $2,710,602.00 and $2,687,791.00 respectively for support of [fol. 61] the functions of the Public Utilities Commission, and the Commission has numerous engineers who can calculate and place in evidence the reasonable value of the safety factor in grade crossing separation cases, particularly where the only substantial evidence shows, as in our case, that accidents at the underpasses have cost the Santa Fe nothing whatever. (See Annual Report of the Public Utilities Commission for July 1, 1949, to June 30, 1950, page 97, which states that during the year 264 applications have required investigation and reports by the Engineering Section of the Transportation Department and that among the matters covered are authorizations for the construction and protection of grade crossings and grade separations.)

It is obvious, therefore, that there is no necessity for an arbitrary determination of the amount, if any, which should be assessed against the railroad. On this particular phase of the problem petitioner submits that the imposition of 50% or even a smaller percentage does not bear a *reasonable* relation to the "evils to be eradicated" or the "advantages to be secured" in the existing situation. In 1914 when the underpasses were constructed they were safe for every-

one. Since then the Santa Fe has done nothing in any way to create any hazard at the underpasses below Washington Boulevard. There can be no collision between a train and any vehicle using Washington Boulevard. Admittedly the underpass structures have become inadequate for vehicular traffic on Washington Boulevard and because of faster traffic, more traffic, and larger, wider, and higher trucks there is danger that trucks may scrape the sides of the underpass structure, but the change in the use of highway and in the types of vehicles using it and faster traffic have created this danger, not the railway.

[fol. 62] The City has argued to the Commission that the railroad has a continuing obligation, even though the grades are now separated, to help to provide a safe crossing, and admittedly the early cases so hold. But just as in the *Nashville* case, *supra*, facts and circumstances alter responsibilities and reasonable application of police power in 1920 becomes oppressive and unreasonable under changed conditions in 1952.

Before assuming therefore that the Santa Fe should be assessed a large proportion of the costs of larger structures, reasonable consideration should be given to the following factors as well as to others presented herein:

(a) During the past several years the safety factor has materially changed, and in accordance with the change there should be a shift in the responsibility. Thus 40 years ago grade crossing accidents involved striking a pedestrian, a horse, a wagon, or buggy, usually without damage to the railroad or injuries to its employees or passengers. The situation in 1952 is altogether different. The immense and heavily loaded trucks and trailers, inflammable tank trucks, rolling cement mixers, and other heavy equipment, move on our highways and across railroad tracks several times as fast as the horse, and on fortunately rare occasions have caused considerable damage to trains and personnel. The situation is such that the railroad requires protection from the traffic on the highway, because of conditions brought about by changes in highway traffic.

(b) Enlarging the grade separation structures on Washington Boulevard is tantamount to creating a brand new highway across the railroad. The record shows that when-

ever railroads have required new tracks across existing highways, the railroads have paid the entire costs of such [fol. 63] expansion. The Commission's decision requires the railroad to contribute half the cost of an expanding highway system even though the tracks were originally built across open country, and in 1914 the railroad voluntarily paid half the cost of the existing underpasses. It is as unreasonable as though 50 years from now the Santa Fe will again be asked to contribute to an even larger structure, assuming that the trend of highway development continues and that 50 years hence greatly increased highway traffic and larger vehicles find even a 6-lane roadway inadequate.

(c) Examination of Exhibit 29-RH and the testimony of various witnesses (Tr. pp. 457, 489, 586) shows that crossing protection devices have in recent years cut crossing accidents to a very small percentage of highway accidents and that crossing accidents generally have not constituted a heavy financial burden to the railroads. Insofar as the safety factor is concerned, safety can be accomplished even at grade crossings at much less cost, by installing recently perfected flashing lights or automatic crossing gates. Grade separation construction is tremendously expensive and today can be justified only where economic factors involving delay to traffic on the highway warrant huge expenditures. As Justice Brandeis says in the *Nashville* case, *supra*, train movements are few—highway traffic continuous, and the delay factor has assumed primary importance in the problems today.

(d) The existing structures are completely adequate for railroad purposes. About the same number of trains cross Washington Boulevard as in 1914, and the only need for wider and higher underpass structures is to accommodate highway traffic, a portion of which is competitive with the railroad.

[fol. 64] 2. Assessment of Costs on the Basis of Benefits.

If the Commission's authority to assess a part of the costs to the Santa Fe is based upon the *benefits* conferred upon the Santa Fe, because as the Commission says in its order, the Santa Fe can operate longer trains without experiencing delays, without hazard of crossing accidents,

and the use of a new bridge to replace an old one (see Decision No. 47344, p. 18), the assessment so founded must be made within constitutional limits. The railroad is entitled to *just compensation* for any imposition to pay such costs. (United States Constitution, Fifth Amendment; California Constitution, Art. I, Sec. 14.) The Commission's finding that the proposed improvement is "not without benefits to the railroad" discloses the *de minimus* character of the benefits and the lack of substantial evidence to support an assessment of 50% of the costs on this basis. Compare studies made in other states where the value of a grade separation resulting in closing a grade crossing has been calculated to average 4 to 5% of the cost of the structure (Tr. 421, p. 60; Ex. 29-RH). The evidence is uncontradicted that the present structures over Washington Boulevard will permit the Santa Fe to operate long trains without experiencing delays and without the hazard of grade crossing accidents and are entirely adequate for railroad purposes (Tr. pp. 99, 384, 474, 493). At page 18 of the Decision, the Commission finds that the bridges are 75% depreciated, but there is no foundation in the evidence for any such finding. The evidence, on the contrary, is that these bridges, built in 1914, are useful for another [fol. 65] fifty years; and that such bridges if to be replaced, will be replaced then because of obsoleteness rather than because of structural deficiency (see testimony of Mr. Terrass, Tr. pp. 514-521). In fact the substantial evidence is uncontradicted that the proposed structures will place upon the Santa Fe the detriment of increased maintenance costs (Tr. p. 99); that construction of the proposed structures is an improvement of the City's major east-west truck route, cross city and cross country (Tr. pp. 82, 113, 115, 140, 291); that such improvements generally have resulted in diverting traffic from the railroads to the competitive highway carrier system; also that charging the railroads with such improvements places the railroads in a weaker competitive position with the highway carriers (Tr. pp. 368, 474, 204, 253).

In any event, if there are benefits to be derived by the Santa Fe from the construction of larger underpasses the value of such benefits can be and have been computed with

reasonable certainty (Tr. pp. 198, 269, 410). Here again, the Commission should capitalize the value of such benefits as it did in the *Goshen Junction* case (1933), 38 C. R. C. 380. It should also calculate the value of the benefits received by the users of the highway, in accordance with the Johansing Formula referred to in the record (Tr. p. 218).

Any failure on the part of the Commission to assess benefits upon a reasonable basis condemns the assessment as the taking of property without just compensation in violation of a well-known principle of constitutional law:

> Although an individual taxed may receive no benefit and indeed suffer detriment, any so-called *assess-*
> [fol. 66] *ment* for public improvements laid upon particular property owners are ordinarily constitutional only if based upon *benefits* received by them.
>
> *Nashville, C. & St. L. R. Co. v. Walters*, 294 U. S. 405, 79 L. Ed. 949, 953;
>
> *Connecticut Ry. & L. Co. v. City of Waterbury* (Conn. 1941), 18 A. 2d 700 (benefits assessed against a property owner for a public improvement may not be greater than the benefit conferred and must be a special pecuniary benefit as distinguished from general benefits to the public at large);
>
> *Cf. Northwestern Pac. R. R. Co. v. Superior Court* (1949), 34 Cal. 2d 454, 211 P. 2d 571.

The Nashville Case

Petitioner recognizes the implication of earlier decisions in these grade separation-cost apportionment cases but in 1935, the Supreme Court of the United States in the *Nashville C. & St. L. R. Co. v. Walters* (1935), 294 U. S. 405, 79 L. Ed. 949, took a new look at the tendency toward assessing railroads a blanket 50% of the cost of grade separation improvements and condemned one such assessment as arbitrary under the facts of that case. In that case suit was brought by the railroad challenging the constitutionality of a Tennessee Statute requiring railroads to pay one-half the cost of separation of grades. The Commission of the State of Tennessee had ordered the

railroad to construct an underpass for a proposed state highway. It was concluded that the State may under its police power impose upon a railroad the whole cost of eliminating a grade crossing or such part thereof as it deems appropriate but the railroad contended that to [fol. 67] impose upon the railroad one-half the cost was, under the circumstances, arbitrary, unreasonable and in violation of the Fourteenth Amendment. The trial court held that the order and statute as applied were arbitrary, unreasonable and void. The State Supreme Court declined to consider the special facts which the railroad contended showed the order to be arbitrary and held that the statute was constitutional.

The United States Supreme Court reversed the decision holding that the facts of the case could render the statute unconstitutional, observing that the statute when enacted, might become invalid by change in the conditions to which it applied, stating that the police power may not be exerted arbitrarily or unreasonably. Justice Brandeis, who wrote the opinion, pointed out that the charge of arbitrariness was based primarily upon the revolutionary changes incident to transportation wrought in recent years by the widespread introduction of motor vehicles, by changes in the character, construction and use of highways and in the occasion for elimination of grade crossings, etc. He stated:

> "The railroad has ceased to be the prime instrument of danger and the main cause of accident. It is the railroad which now requires protection from dangers incident to motor transportation. Prior to the establishment of the Federal-aid system, Tennessee highways were built under the direction of the county courts, and paid for out of funds raised locally by taxation or otherwise. They served, in the main, local traffic. The long distance traffic was served almost wholly by the railroads and the water lines. Under those conditions the occasion for separation of grades was mainly the danger incident to rail operations; and the promotion of safety was then the main purpose of [fol. 68] grade separation. Then it was reasonable to impose upon the railroad a large part of the cost of

eliminating grade crossings; and the imposition was rarely a hardship. For the need for eliminating existing crossings, and the need of new highways free from grade crossings, arose usually from the growth of the community in which the grade separation was made; this growth was mainly the result of the transportation facilities offered through the railroad; the separation of grade crossings was a normal incident of the growth of rail operations; and as the highways were then feeders of rail traffic, the community's growth and every improvement of highway facilities benefited the railroad. The effect upon the railroad of constructing Federal-aid highways, like that here in question, is entirely different. They are not feeders of rail traffic. They deplete the existing rail traffic and the revenues of the railroads. Separation of grades serves to intensify the motor competition and to further deplete rail traffic. The avoidance thereby made possible of traffic interruptions incident to crossing at grade are now of far greater importance to the highway users than it is to the railroad crossed, for the rail operations are few, those of motor vehicles very numerous."

And it was observed:

"While the railroad, the sufferer from the construction of the new highway, is burdened with one-half of the cost of the underpass, the owners of trucks, busses and others, who are the beneficiaries of its construction, are immune from making any direct contribution toward the cost."

At page 963 the opinion states:

"The Supreme Court of Tennessee erred in refusing to consider whether the facts relied upon by the Railway established as arbitrary and unreasonable the [fol. 69] imposition upon it of one-half the cost of the underpass.

"The promotion of public convenience will not justify requiring of a railroad, any more than of others, the expenditure of money, unless it can be shown that

a duty to provide * * * the particular convenience rests upon it. (Citing cases.) These were the authorities relied upon by this Court in Chicago, St. P. M. & O. R. Co. v. Holmberg, 282 U. S. 162, 167, 75 L. Ed. 270, 273, 51 S. Ct. 56, where it held that to require a railroad to provide, at its own expense, an underpass, not primarily as a safety measure but for private convenience, was a denial of due process.

"It is true that the police power embraces regulations designed to promote public convenience or the general welfare, and not merely those in the interest of public health, safety and morals. (Citing cases.) And it was stipulated that 'in the light of modern motor vehicular traffic anything which slows up that traffic is an inconvenience. In other words, eliminating a grade crossing, as in the case at bar, facilitates the speed of motor vehicular traffic, in accordance with public demands.' But when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured. (Citing cases.) While moneys raised by general taxation may constitutionally be applied to purposes from which the individual taxed may receive no benefit, and indeed, suffer serious detriment; (citing cases) so-called assessments for public improvements laid upon particular property owners are ordinarily constitutional only if based on benefits received by them. (Citing cases.)"

[fol. 70]

V.

The Commission's Decision Fails to Find Ultimate Facts on Material Issues, Makes Findings Not Supported by Any Substantial Evidence and Other Findings Contrary to the Evidence, Thus Denying to the Santa Fe Its Constitutional Rights to Substantive and Procedural Due Process.

A. Section 1757 of the Public Utilities Code provides in part:

> "The findings and conclusions of the Commission on questions of fact shall be final * * * Such questions of fact shall include ultimate facts * * * "

The interpretation of the above statutory enactment must be considered in conjunction with the authorities cited in Section 3 of the brief, *supra*.

The above section in the Public Utilities Code must be read with the language in the case of *Nashville, C. & St. L. R. Co. v. Walters* (1934), 294 U. S. 404, 428, 79 L. Ed. 949, 956, where in matters that involve the Constitution of the United States, the court said:

> "First. Unless the evidence and the special facts relied upon were of such a nature that they could not conceivably establish that the action of the State in imposing upon the Railroad one-half of the cost of the underpass was arbitrary and unreasonable, the Supreme Court obviously erred in refusing to consider them."

Likewise a state statute cannot deprive a party complaining of an infringement of its rights under the Federal Constitution of an independent review of the law and facts by a judicial tribunal when the order or decision of [fol. 71] the Commission is challenged. (*American Toll Bridge Co. v. Railroad Com.* (1938), 12 Cal. 2d 184, 191.)

Conspicuously absent from the Commission's decision is any finding as to the benefits to be received by the City and the traveling public represented by the City from the proposed project. The evidence is uncontradicted that delay to highway traffic is extremely important. (See Tr. pp. 85, 197, 218, 246 and Exs. 27 and 29-RH.) The City's witnesses expressed the view that it was imperative the street be widened under the Santa Fe tracks to provide for greater traffic flow and to relieve congestion from Washington Boulevard and parallel streets. There is entirely wanting in the decision any findings as to the proportion each party would benefit from the project.

B. In *Southern Pacific Company v. R. R. Comm.* (1939),

13 Cal. 2d 125, 127, it was pointed out that the statutory requirements as to "findings" to be made by the Commission are practically identical with those contained in the Workmen's Compensation Act, and that where findings are made without evidence the courts will annul and set aside the decision and order of the Commission.

Further there must be subordinate findings supported by the evidence to support the ultimate finding of the Commission (see Pub. Util. Code, Sec. 1757).

The Commission's finding that the proposed widening of the boulevard is to meet local transportation needs and that the City's contribution must come entirely from local funds (p. 17 of the Decision) is wholly without foundation in the evidence. The City's witness, Mr. Winter, testified that Washington Boulevard is an important cross city and [fol. 72] cross county highway; that it carries heavy truck traffic, and will connect with the Santa Ana Freeway (Tr. pp. 38, 39, 82, 84). The City's witness, Mr. Dorsey, testified that the intersection of Washington Boulevard and Alameda Street, about 4,300 feet from the underpasses, is the focal point for truck traffic; that large trucks using Washington Boulevard are inter-city traffic; that approximately 26 percent of the traffic on Washington Boulevard is truck traffic and that if Washington Boulevard is improved as proposed in the instant proceeding, many more trucks will use Washington Boulevard (Tr. pp. 29, 110, 113, 140, 144).

Santa Fe's witness, Mr. Jenkins, pointed out that Washington Boulevard carries a heavier proportion of truck traffic than the state highways in California and that it is the principal east-west truck route through the City (Tr. pp. 291, 298).

With respect to the finding that the City's contribution must come entirely from local funds, the record discloses that there are gas tax funds apportioned to the City by the state which are made available in millions of dollars for improvement of city streets (see Ex. 29-RH, table A-19; Tr. pp. 208-209, 427). Of course, the source of funds has nothing to do with the authority of the Commission to apportion costs:

> *Chicago B. & C. R. Co. v. Illinois Commerce Commission* (Ill. 1951), 101 N. E. 2d 92, 95 (holding

> that the Commission's decision placing the entire cost of automatic flashing light signals on the railroad was an arbitrary exercise of the police power and that the Commission's statement that "the village of Keysport does not have surplus funds" does not in any manner properly adjust [fol. 73] and settle the question of benefits to the diverse interests of the railroad and other public authorities concerned).

The Commission's finding that the existing bridges are 75 percent depreciated is contrary to the evidence, the only evidence being that the bridge still has fifty years of useful life and requires only normal maintenance.

In *Southern Pacific Co. v. Railroad Comm.* (1939), 13 Cal. 2d 125, 128, in quoting from a text the court said:

> "* * * 'where such findings have been made without any evidence to support them, the award, will of course, be annulled.' "

and then stated:

> "Although in the instant matter, in effect, the commission contends that regardless of the strength of evidence presented by the petitioner, and even in the absence of any evidence introduced to the contrary, the commission has the right to disregard the evidence and decide the issue according to its own concepts,—as a conclusion from the foregoing authorities it becomes apparent that the Railroad Commission has no greater authority than has the Industrial Accident Commission on questions of fact; and where, as here, all the evidence supports the petitioner's contention, and none has been adduced in opposition thereto, the ruling of the commission amounts to the making of an order by the commission without any evidence in support thereof."

Thus the issue is squarely presented that the Commission does not have "the right to disregard the evidence and decide the issues according to its own concepts," that is, allocate the costs on a 50% basis. The Commission

must base its decision and order on substantial evidence, yet it did not do so in this matter.

[fol. 74] VI.

Adoption by the Commission of a 50% Formula in Grade Separation Cases Imposes an Unconstitutional Burden on Interstate Commerce.

In the case of *Erie Railroad Co. v. Board of Public Utility Commissioners* (1920), 254 U. S. 394, 65 L. Ed. 322, 334, the court, involving a grade separation apportionment of costs, stated in dicta as follows:

> "If it reasonably can be said that safety requires the change, it is for them to say whether they will insist upon it, * * * If the burdens imposed are so great that the road cannot be run at a profit, it can stop, whatever the misfortunes the stopping may produce."

After the *Erie* case, the railroads did abandon many of their lines and branch lines that were unprofitable. In some instances, the railroads actually abandoned lines rather than pay the enormous costs involved in grade separations. With this background in mind, the reasons for the adoption of the National Transportation Policy in 1940 can be more readily understood. The Act of September 18, 1940, Chapter 722, Title I, Section I, 54 Stat. 899, amended the Interstate Commerce Act by inserting before Part I thereof the following provision entitled "National Transportation Policy." This new policy is as follows:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered [fol. 75] as to recognize and preserve the inherent advantages of each; *to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers;* to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue prefer-

ences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; —*all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense.* All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." (Emphasis added.)

Thus, the court is faced with a specific change in policy, adopted in view of the existing body of the law which includes of course the above-quoted *Erie* case. It is submitted it is no longer the doctrine of this government that the railroads should quit if they cannot meet the high costs of grade separations where a large proportion of the costs are allocated to the railroads. On the other hand, Congress has stated it is the policy of this government to preserve a national transportation system by rail to meet the needs of commerce of the United States and of the Postal Service and of the national defense. It is further provided in the [fol. 76] National Transportation Policy that it should be recognized that the transportation services promoted should be economical, and that sound economical conditions in transportation should be fostered.

The Supreme Court of the United States in 1947 in *Schwabacher v. United States*, 334 U. S. 182, 92 L. Ed. 1305, 1313, said in discussing the "National Transportation Policy" in the "Interstate Commerce Act":

"* * * This Court has recently and unanimously said in reference to this Act, 'Congress has long made the maintenance and development of an economical and efficient railroad system a matter of primary national concern. Its legislation must be read with this purpose in mind.' Seaboard Air Line R. Co. v. Daniel, 338 U. S. 118, *ante*, 580, 68 S. Ct. 426."

See also:

Interstate Commerce Commission v. Parker, 326 U. S. 60, 89 L. Ed. 2051.

The instant decision must be considered in connection with other grade crossing separation projects in California, and in other states, and the evidence shows that the Santa Fe operates in thirteen states and is called upon by other states and their political subdivisions to contribute toward grade separation construction. The evidence shows further that in California alone it would cost two and one-half billion dollars to separate all the grade crossings in the [fol. 77] state and that in one county of the state the Santa Fe has recently been called upon to contribute toward the construction of eight such projects. It is reasonable to conclude that as automobile and truck registrations mount and highway construction doubles and trebles as it has in recent years and, as motorists chaff at delay, the pressure for new grade separations will increase. It is also reasonably apparent that imposition of costs on the railroads based upon a 50% formula to build very many of the new expensive grade separation structures would be a very great burden on any institution including the railroad industry. At some point an imposition of charges against the railroad for these projects unrelated to benefits received by the railroad must become a intolerable burden on interstate commerce and it is for the courts to determine at what point the imposition becomes unconstitutional. The case of *Pa. Rd. v. Driscoll*, 198 Atl. 130 (Pa. 1938, Pa. 1939), 9 A. 2d 621, 631, stands for the proposition that if the costs of compliance with the legislative mandate are arbitrary and unreasonably oppressive then the mandate is void.

The Santa Fe submits that at some point the cost of complying with cost apportionment orders will become so oppressive as to unconstitutionally burden interstate commerce, and that when the Commission apportions costs at 50% in the projec here involved, the burden on interstate commerce has become so oppressive as to unconstitutionally burden interstate commerce.

[fol. 78] VII

The Commission's Decision Is an Arbitrary Departure From Its Earlier Decisions and From an Established Trend, Based Upon Changed Circumstances, Toward Assessing Costs on the Basis of Benefits.

The widening of the very same grade separation involved here was before the Railroad Commission in 1932, 37 C. R. C. 784. The Santa Fe opposed apportionment of costs on the ground that it would receive no more benefit from the widened separations, that the widened separations would be a detriment to the railway company in as much as maintenance cost would be increased, and that the railway company should not be required to bear any part of the cost of widening said separations since the portion of the public traveling by vehicle would derive the entire benefit from such improvements. The Commission then considered the matter of direct financial benefits not being the sole test in determining the respective portions which the railway and public should contribute to the cost of such improvement. It reasoned that due consideration should be given to the obligations of each party as well as the benefits derived, but it recognized that the portion of the public traveling by vehicle would receive the greatest benefit from the widening of these separations and so concluded that this class of the public should bear the greatest portion of the cost. One fourth of the cost was assessed against the Santa Fe for a roadway fifty-six feet in width and three-fourths against the City. The time for construction was limited to one year and provision was made for lapse if construction was not commenced within that period. Since the City failed to commence construction within a year, the authorization lapsed and the Commission's order became ineffective.

[fol. 79] This decision indicates that the Commission recognized—even at that time before the benefit theory had been fully evolved—that cost allocations in cases of this sort should be made on the benefit basis applying sound economic doctrines.

The Commission in that case made the above-mentioned apportionment order solely with reference to the cost of

widening the existing structures to provide a roadway of fifty-six feet. The order specifically provided that if the City elected to construct a wider underpass the *entire* additional cost would have to be borne by the City. The pertinent portions of the order read as follows (37 C. R. C. 784, 787):

> "(1) The entire expense of constructing said undergrade crossings, on the basis of a roadway width of fifty-six feet, shall be borne twenty-five per cent by The Atchison, Topeka and Santa Fe Railway Company and seventy-five per cent by applicant.
>
> "(2) In the event applicant elects to construct said undergrade crossings of a roadway width in excess of fifty-six feet, the entire additional cost of such construction over and above the cost of constructing said undergrade crossings of a roadway width of fifty-six feet shall be borne by applicant."

The fact that the City in 1932 suggested a 56-foot roadway and now in 1949 suggests a 90-foot roadway proves the point that the sole cause of any need for a wider roadway is the increase in vehicular traffic.

In the matter of a crossing separation near *Goshen* (1933), 38 C. R. C. 380, the Southern Pacific contended that if the applicant (Department of Public Works of California) insisted upon constructing the proposed separation when it had not been shown that the economic benefits [fol. 80] justified the substantial expense of a separation, any assessment upon the company should be limited to the direct benefits to be derived therefrom in the way of decreased operation expense resulting from the elimination of maintaining the existing grade crossing and protection. The Commission did not fully agree with this contention but pointed out that in allocating costs "we are departing from the practice which has obtained generally heretofore of assessing one-half to each the public and the railroad in case of an existing grade crossing." Then it commented as follows:

> "While this procedure has appeared equitable in the past, the tremendous changes in transportation

conditions make necessary a reappraisement of the liabilities of the two parties in interest. The railroad still continues to be the aggressor in preventing the free and unhampered use of the public thoroughfare, but the needs of the traffic on the highway have not only increased and changed in nature, but the use of the highway has become in large measure directly competitive with the rail lines. These and incidental conditions following them have changed the benefits flowing from the separation of grades between these two great avenues of traffic."

The order authorizing the grade separation fixed the amount to be contributed by the railroad in a lump sum based upon direct and indirect benefits, arrived at by capitalizing an amount measuring the annual benefits and privileges on a six percent basis. The remainder of the cost was to be borne by the applicant if it elected to proceed with the construction of the separation.

In another case the Commission made an investigation into the adequacy of existing protection at certain grade [fol. 81] crossings of *Alameda Street*, Los Angeles, and the Southern Pacific and Pacific Electric tracks (1939), 42 C. R. C. 59, and found that the installation of wigwag and traffic signals at grade reduced the hazard and congestion, with beneficial results to the railroad and the municipality. It was determined that benefits to be derived by each of the interested parties should be the primary consideration in cost allocation.

The City of Albany applied to the Commission for an order authorizing the widening, altering, improving, and partial relocation of an existing crossing of a public road, highway and street over the tracks of the Southern Pacific Company, connecting two existing portions of Buchanan Street (1941), 43 C. R. C. 440. In apportioning the cost where the grade crossing improvement would require three times as much paving area, the Commission ordered one-third of the expense of new paving to be borne by the railroad and two-thirds by the City and also ordered the City to pay the whole cost of crossing gates and flashing light signals where the crossing was originally intended to reach

a garbage dump but would now be used to reach a race track and highway.

Thus the Commission itself has recognized that conditions have changed to such an extent that a 50% formula is arbitrary and unreasonable. It is interesting to observe the language of the Commission in Decision No. 43374, dated October 4, 1949, superseded by the rehearing order and to note the finding therein at page 8:

> "Thus we are specifically faced with the problem of who shall pay the cost of widening the underpass where the necessity for such widening is not due to the activities of the railroad but rather to the needs of the automotive and pedestrian traffic."

[Vol. 82] Or compare the language of the Commission concerning the same underpass in 1932, 37 C. R. C. 784, 787;

> "There can be no question that the vehicular public will receive the greatest benefit from the widening of these separations, so it logically follows that this class of the public should bear the greater portion of the cost."

The Commission has attempted to justify its rehearing order on the ground "this record disclosed that material changes have taken place in conditions at the present time as compared to those in 1932" (see p. 17 of the Decision). This is an irrational observation in view of the uncontradicted evidence that the change is required solely because of the need for expediting traffic on the highway and in no way justifies an imposition of 50% of the costs in 1952 as compared to an imposition of only 25% of the cost for the same project in 1932; on the contrary, the trend noted by the Commission has continued apace toward competitive use of the highways adverse to the railroads and increased needs of the traffic on the highway.

What are these "material changes," to which the Commission refers, that have taken place since 1932:

Exhibit 29-RH traces these material changes from about 1830 to the present time. It shows that the first half of the 19th century was characterized by the turnpike, toll road, and local highway. These were replaced in the second half

of the century by the railroads which were extended aggressively over existing highways and because of their ponderous fast-moving equipment endangered the local slow-moving traffic on the highways.

Until the advent of the automobile and truck, highways were financed by taxation and served as feeder roads to [fol. 83] the railroad passenger station and freight depot. Grade separations to which the railroads contributed not only served to prevent accidents, but also to bring additional traffic and revenue to the railroads.

But toward the turn of the century the hard-surfaced roads, the automobile, and the truck came into being. In 1904 railroad trackage exceeded the length of all surfaced highways. By 1916 railroad mileage ceased to expand and commenced by successive abandonments to decrease. Surfaced highways in 1904 extended 153,662 miles. Since then the highway mileage has increased enormously and now exceeds 3,326,000 miles of which 1,785,000 are surfaced. In California mileage of highways increased from 2,008 in 1920 to 13,994 in 1949, 59.9%. In 1948 approximately 20% of public funds were expended on highways.

Our expanding highway system has, of course, been used, resulting in the continuous expansion of a highway transportation system highly competitive with the railroads. This competition has removed railroads from a monopolistic position in the transportation field and has reduced its earning capacity, during the past twenty years, to 3.2% net return on investment. Truck and bus mileage almost doubled from 1936 to 1948. In California, truck registrations increased from 343,853 in 1941 to 547,208 in 1948. In 1933 there were only 108,189 trucks in California (Ex. 29-RH, Tables 1, 2, 3, 4 and 5). An extensive use of competitive commercial trucks is indicated by the count on Washington Boulevard—one truck to every four automobiles, this figure exceeding the average ratio of trucks on our state highways (Ex. 29-RH, pp. 31-32).

[fol. 84] Let us compare the material changes in the trend of railroad business. In recent years practically all short-haul freight traffic, once enjoyed by the railroads, has gone to the trucks, particularly in metropolitan areas (Tr. pp. 235, 368). The same is true of passenger traffic (Tr. p.

482). A six-lane highway is not necessary to move freight or passengers to the railroad. The wagon and the buggy did that over the dirt roads and unimproved highways. Now in order to accommodate wider and taller trucks traffic lanes have been widened from seven to eleven and twelve feet. Vertical clearance must be increased to fifteen feet to accommodate the largest trucks and multiple-lane highways are necessary to accommodate swift, mixed passenger and truck traffic. Anyone who drives an automobile on our highways can see the shift of transportation from the railroads to the highway box cars. In California in 1938 the railroads enjoyed 27.8% of the gross revenue from the transportation business, commercial trucks 65.9%. By 1949 the figures were 20.9% and 73.7% respectively (Tr. p. 280). These are the material changes since 1932. They show a continuance of the trend noted by the Commission in the *Goshen* case, *supra*, and scarcely justify doubling the percentage of costs apportioned to the Santa Fe.

Other states have recently examined the problem of cost apportionment in the light of changed conditions, namely, Michigan, West Virginia, Indiana, Illinois, Ohio and New York, and have given recognition realistical to the principal that the party that benefits from grade separations should bear the cost (see Chap. 8, p. 68, Ex. 29-RH). Thus in [fol. 85] New York the recently established practice and state policy is to assess no more than 15% of grade separation project costs as the railroad's portion restricting the amount to be paid to benefits derived and wholly excusing the railroad from sharing the cost of grade separation projects on state throughways and on arterial routes in cities.

Federal practice as expressed in General Administrative Memorandum No. 325, of the Public Roads Administration, dated August 26, 1948, Exhibit 20, would require no payment by the railroad in the instant case, recognition being given to the fact that there are no appreciable benefits to the railroad from enlarging an existing grade separation.

It is interesting to contrast the decision of the Commission in the instant case with the findings of the Assembly Interim Fact-Finding Committee on *Tideland Reclamation and Development in Northern California, Related Traffic*

Problems and Relief of Congestion on Transbay Crossings, a report on the Railroad-Highway Crossing Problem in California, published by the Assembly of the State of California in May, 1951. The following are excerpts from this document. From the letter of transmittal to the Speaker of the Assembly is the following excerpt (p. 6):

> "From the testimony presented at the hearings it would appear that the pressure for increased grade crossing separations is out of proportion to the accident hazard but that it derives more from irritation of an increasing driving public over delay factors. [fol. 86] If a state-wide railroad-highway crossing program is undertaken, that the benefit-cost ration be seriously considered as the basis for determining (a) justification for separations (b) priorities."

The following excerpts are taken from the report itself: Page 10:

> "The accident factor, or hazard, while frequently mentioned in hearings and public demands for separations, does not appear alone to be sufficient justification for the construction of separation structures. Studies of the Public Utilities Commission and others, indicate that, in general, safety can be obtained much less expensively by use of modern protective devices."

Page 10:

> "Over the last half-century there has taken place a gradual but marked change in public policy with respect to the responsibility of the railroads for costs of crossing separation. Early in the century the railroads paid the major share of the cost of many separations; probably this was in part due to the prevailing public attitude regarding responsibility for accidents and the belief by the railroads themselves that appreciable although intangible benefits accrued from the reduction of such accidents."

Page 12:

"Inasmuch as grade-crossing accidents are sporadic, and since even in some cases where the demands for separation are great, the number of accidents are relatively few, it is suggested that the estimate of benefits due to accident elimination be placed on an actuarial basis. In other words, by use of experience data on [fol. 87] the potential accident hazard, taking into account the rail and highway traffic, physical crossing factors, etc., the probable (average) accident frequency would be determined and the potential annual cost estimated therefrom."

Page 14:

"Summary of Conclusions.

f. It would be difficult to justify many, if any, separations on the basis of accident frequency alone.

g. The demand for grade separations appears to stem largely from public irritation with delays.

h. The share of the railroads in the cost of grade separations has been declining over the years to a point where such projects may have to be financed largely from public funds.

i. The concept of sharing of costs by participating agencies on the basis of relative benefits appears to be gaining acceptance.

k. If a state-wide grade separation program is undertaken, it is recommended that the benefit-cost ratio be seriously considered as the basis for determining (i) justification for separation, (ii) priorities.

l. If a grade separation program is undertaken on a benefit-cost ratio basis, it will be necessary to obtain considerable information on delay factors at crossings."

Page 20:

"A complete separation program that would provide for the elimination of all grade crossings on main and branch line railroads in this State would involve an expenditure of *approximately two and one-half billion*

dollars." (From 1949 report of the Public Utilities Commission.)

[fol. 88] Page 22:

"It is of interest to note that in these analyses, as in numerous others, the losses due to delays tend to overshadow the loss due to accidents at major crossings for which separation can be economically justified" (Comment on special 1950 studies by the Public Utilities Commission.)

Page 31:

"It should be obvious from these data that the grade crossing accident picture is steadily improving, and that for the State as a whole, the critical problem lies in other segments of the highway system. For example, if it were practical to completely eliminate all crossing accidents, by grade separation or otherwise, the total number of accidents would be reduced by only a little more than 1 percent."

Page 36:

"Trend in Railroad Responsibility.

Over the last half-century there has taken place a gradual but marked change in public policy with respect to the responsibility of the railroads for costs of crossing separation. Early in the century the railroads paid the major share of the cost of many separations; probably this was in part due to the prevailing public attitude regarding responsibility for accidents and the belief by the railroads themselves that appreciable although intangible benefits accrued from the reduction of such accidents.

By 1930, it was more or less common practice for a railroad and the public agency concerned to share the costs of crossing separations equally, if and when agreements could be reached.

The federal NRA legislation in 1933, under which, in some cases, government assumed 100 percent of the

[fol. 89] cost of a separation facility, markedly influenced public policy regarding participation.

In recent years, the share of the cost of crossing separation work assessed to the railroads has generally been less than 15 percent. The provision of the Federal Aid Highway Act of 1944, to the effect that the devision of costs be on the basis of relative benefits but not in excess of 10 percent to the railroad, has been influential, even though the ruling applied only to separations on the federal-aid system.

It would thus appear that no appreciable funds are likely to be applied, except by public agencies, to crossing separation work, where the purpose is primarily in the interest of highway transportation."

Another impartial agency, the Stanford Research Institute, has studied the problem of cost apportionment. Since the conclusions of this scholarly research organization, like the conclusions reached by the Assembly Fact-Finding Committee, effectively corroborate the railroad's position in this brief, the following quotations from the report are quoted for the court's consideration as a further argument in support of this petition:

(From *The Railroad-highway Grade Crossing Problem*, by A. Kenneth Beggs, Senior Economist, Stanford Research Institute, published by the Stanford Research Institute, Stanford, California, May 1, 1952.)

"Allocating Costs for Grade Crossing Projects.

Conclusions:

1. All grade crossing improvements and eliminations provide joint services or products for motor vehicle users, the railroads, and the general public.

[fol. 90] 2. The costs of grade crossing improvements and eliminations are joint costs.

3. When products or services are produced jointly, their costs are joint and cannot be allocated directly to each product. In such cases, joint costs can only be distributed in accordance with the relative demand for the products or services.

4. The relative demands of the several beneficiaries for the services of grade crossing improvements and eliminations should determine the distribution of the total (joint) costs of the projects among the beneficiary groups.

5. The relative demands of the beneficiary groups should be measured by the relative value of benefits each receives from the grade crossing projects.

6. There is no essential difference in sound principles of cost allocation between (a) grade crossing improvements, (b) separations, and (c) opening and closing of crossings.

7. Any distribution of costs based upon whether the highway or railway was first located at the crossing is not economically sound.

8. Almost all states have statutes either fixing the distribution of costs for crossing projects or vesting the power to do so in a public body.

9. Two significant tendencies have developed over recent years in distribution of the costs for grade crossing projects. First, the percentage of total costs assigned to railroads has declined. Second, state laws are providing increasingly for distribution of costs on the basis of benefits received.

[fol. 91] 10. The United States Supreme Court has formally recognized the validity of distributing costs for grade crossing projects among beneficiary groups on the basis of relative benefits received.

11. The policy of distributing costs for projects undertaken with Federal-aid funds by assigning arbitrary values of benefits to the railroads and to the general public is economically unsound.

12. Prior to 1933, the California Public Utilities Commission assigned costs for projects to the railroads and the public generally on a fifty-fifty basis. Subsequently, the Commission adopted the benefit basis for cost distribution on crossing projects.

13. In 1949, the California Public Utilities Commission gave evidence of reverting to its earlier unsound fixed-percentage basis of cost assignment on grade crossing projects. The particular case reflecting

the change in Commission policy was presented for a rehearing, and no decision on the rehearing has yet been rendered by the Commission." (Page 44.)

The report of the Stanford Research Institute then points out:

"FIXED-PERCENTAGE BASIS NOT SOUND.

"A policy of assigning costs for a grade crossing improvement to railroads (or to other beneficiary groups) on the basis of a fixed percentage of total costs is no more realistic or economically sound than in an assumption that the economic nature and character of the grade crossing area, crossing usage, and highway development and usage may be identical as [fol. 92] between grade crossings. Economic variations relating to various grade crossings are so great that a fixed-percentage basis of cost allocation cannot be economically sound." (Page 47.)

The report of the Stanford Research Institute then went on to observe that:

"THE SUPREME COURT ON COST DISTRIBUTION.

"Legal responsibility of the railroads for assuming costs on grade crossing projects was defined by the Supreme Court in a 1914 ruling based, of course, upon economic conditions in existence at the time.

"It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings, but also to build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their tracks, or to carry their tracks over such highways * * *(9).

"In another 1914 case, the same court said:

"That a railway company may be required by the state, or by a duly authorized municipality acting under its authority, to construct overhead crossings or viaducts at its own expense, and that the consequent

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(9) *Chicago, M., St. P. R. Co. v. Minneapolis* (1914), 232 U. S. 437, 58 L. Ed. 674.

cost to the company as a matter of law is . . . deemed to be compensated by the public benefit which the company is supposed to share, is well settled by prior adjudications of this court * * * (citing cases) (10).

[fol. 93] "Under these decisions it may be inferred that there is no legal limit to the portion of the total costs for grade crossing improvements and eliminations which may be assigned by public bodies to the railroads. These cases were, however, predicated upon a different set of economic facts than exists today. The requirement for grade crossing improvements in 1914 was a requirement for increased public safety, and not basically a demand for increased free flow of traffic at crossings as is the case today.

"Fruend has made the following observation:

"It is an elementary principle of equal justice that where the public welfare requires something to be given or done, the burden be imposed or distributed upon some rational basis, and that no individual be singled out to make a sacrifice for the community. The principle lies at the foundation of the law of taxation, and applies equally to the police power. With reference to the latter it may be expressed by saying that to justify the imposition of a burden there must be some connection of causation or responsibility between the person selected or the right impaired and the danger to the public welfare or the public burden which is sought to be avoided or relieved (11).

"The Supreme Court, which recognizing the regulation of grade crossings as a legitimate exercise of the police power of the states, has indicated that this power is subject to a constitutional limit and that it may not be exerted arbitrarily or unreasonably. The court, in a 1935 case involving allocation of costs of a [fol. 94] grade crossing elimination, took into full account the change in economic conditions since its earlier decisions. It also recognized the necessity for

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(10) *Missouri Pacific R. Co. v. Omaha* (1914), 234 U. S. 127, 59 L. Ed. 160.

(11) Ernest Freund, The Police Power, p. 635.

justifying a burden on the railroads for such costs. The Court said:" (The report quotes at length from the *Nashville* case, *supra*; see Point IV above.)

"This position by the Supreme Court indicates the legal as well as economic necessity for taking into account the reasons for grade crossing improvement and elimination projects, and for considering relative benefits in distribution of costs for grade crossing projects." (Pp. 42-43.)

It was further pointed out in the Stanford Research Institute Report the following under the section heading of:

"Accidents as a Basis for Justification of Grade Crossing Projects.

"Conclusions:

1. Public safety remains the publicized basis of demand for railway-highway grade crossing improvements or eliminations, although the principal basis is actually the demand for greater conveniences in highway travel.

2. If only public safety were involved, adequate protection (except against careless drivers) could be obtained in most instances at less cost by installing highly effective protective devices than by constructing separations.

[fol. 93] 3. Grade crossing accidents in the United States have decreased slightly since 1934 even though there has been an increase in the number and use of motor vehicles on the highways. There has been a marked tendency toward relative improvement in the hazard situation.

4. Grade crossing accidents in the nation as a whole are not overly significant when compared with total highway accidents. Grade crossing accidents in California have in recent years declined in significance relative to total highway accidents.

5. Most highway accidents result basically from increased highway travel, inadequate highway capacity, and lack of caution by motor vehicle drivers.

6. The reduction of highway accidents involves three

approaches: (a) additional safety provisions in vehicle construction, (b) regulation of highway uses and education of users, and (c) design and construction of highways to provide additional built-in safety.

7. Motor vehicle users have a right to receive and public bodies a duty to provide adequate protection and warning devices at railway-highway crossings. If these warning and protective devices are provided but ignored, motor vehicle users should bear the economic responsibility for accidents." (P. 16.)

[fol. 96] CONCLUSION.

In conclusion your petitioner requests that a writ of review issue; and submits that the decision is an arbitrary, unreasonable and unconstitutional exercise of authority by the Public Utilities Commission; that the decision apportioning 50 percent of the costs bears no reasonable relationship to the dangers to be eradicated and benefits to be derived in enlarging the existing grade separations; that the decision is not founded upon substantial evidence but wholly ignores the uncontradicted evidence which justifies the allocation of a very small proportion of the costs, if any, to the Santa Fe; and that the order and decision of the Commission should be annulled and set aside.

Respectfully submitted,

ROBERT W. WALKER,
J. H. CUMMINS,
Attorneys for the Petitioner, The Atchison, Topeka and Santa Fe Railway Company.

[fol. 97] IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

(Title Omitted)

ANSWER TO PETITION FOR WRIT OF REVIEW—
Filed September 12, 1952

To the Honorable Phil S. Gibson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the State of California:

The Public Utilities Commission herewith respectfully submits its answer to petition for writ of review herein.

PRELIMINARY STATEMENT

Petitioner, hereinafter referred to as Santa Fe, attacks Decision No. 47344 (1) of June 24, 1952, issued on rehearing by this respondent Commission in Application No. 29396 of the City of Los Angeles for an order authorizing and requiring the widening, increasing the vertical clearance [fol. 98] and improving of the crossings of Washington Boulevard and the Harbor Branch Line and the Main Line railroads of said Santa Fe, designating the portions of the work by each of said parties and allocating the cost hereof.

The facts, generally speaking, are not in issue, the disagreement as between the City of Los Angeles and the Santa Fe centering over the fifty-fifty division of the improvement costs allocated by this Commission.

Public hearings, including rehearings, were conducted as to every phase of the situation, all matters were briefed by the parties and oral argument before the Commission en banc was had following the rehearings of December 1950, February and March of 1951.

As the Court is aware, the authority of this Commission to allocate costs in matters of this kind stems primarily from Section 1202 of the Public Utilities Code, from which

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(1) Appendix A herein.

we quote in part: (Section 1202. Exclusive Powers of Commission)

"The Commission has the exclusive power:

"(b) To alter, relocate, or abolish by physical closing any such crossing heretofore or hereafter established.

"(c) To require, where in its judgment it would be practicable, a separation of grades at any such crossing heretofore or hereafter established and to prescribe the terms upon which such separation shall be made and the proportions in which the expense of the construction, alteration, relocation or abolition of such crossings or the separation of such grades shall be divided between the railroad or street railroad corporations affected or between such corporation and the state, county, city, or other political subdivision affected."

Petitioner, Santa Fe, says that the foregoing decision is arbitrary, unreasonable and unconstitutional and that no costs whatsoever should be allocated to it, because, as it claims, no direct benefits are derived therefrom.

Statement of Facts

On June 4, 1949, the City of Los Angeles filed Application [fol. 99] No. 29396, seeking an order from this Commission which would:

(a) Authorize and require the widening, increasing the vertical clearance and improving of the crossings of Washington Boulevard and the Harbor Branch Line (2) and the main line (3) railroads of Santa Fe.

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(2) This crossing is designated as Crossing No. 2H-0.1-B, and the legal description is as follows: That portion of the right of way, 66 feet wide, of The Atchison, Topeka and Santa Fe Railway Company (formerly of the California Central Railway Company), described in Deed recorded in Book 491, page 106, of Deeds, Records of said County, included within the lines of Washington Boulevard, 90 feet wide, at Harriett Street.

(3) This crossing is designated as Crossing No. 2-143.2-B,

(b) Designate the portion of the work of said construction to be done by Los Angeles and Santa Fe respectively.

(c) Fix, determine, and allocate the portions of the cost of said work which would be borne respectively by Los Angeles and Santa Fe and fix the time and manner of payment thereof, and

(d) Authorize, require or direct such other or further matters and things in connection with said work as might be appropriate.

The said application alleges that the present grade separations are inadequate to meet the present demands of vehicular traffic in that they are too narrow and the vertical clearances are too low.

Santa Fe's answer denies any need for changing the existing grade separation crossings, alleging that the present crossings are wholly sufficient for the needs of the railroad and the convenience and necessity of the public [fol. 100] using the railroad facilities. Also, that since it will receive no benefit from the proposed changes, and since any alleged need for these changes has been occasioned, not by the railroad activities, but by automotive traffic using the highway, it should not be required to bear any of the costs of changes that might be made.

Following public hearing and opening, closing and reply briefs, the Commission on October 4, 1949, issued its Decision No. 43374, in the course of which it stated that the two grade separation crossings then under consideration were constructed in 1914 pursuant to an agreement between the City of Los Angeles and Santa Fe, that the costs were borne one-half by the city and one-half by the railroad, and

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and the legal description is as follows: That portion of the right of way, 100 feet wide, of The Atchison, Topeka and Santa Fe Railway Company (formerly of the California Central Railway Company), described in Judgment of Condemnation had in Case No. 6855 of the Superior Court of the State of California in and for the County of Los Angeles, a copy of which judgment is recorded in Book 361, page 77, of Deeds, Records of said County, included within the lines of Washington Boulevard, 90 feet wide, at Harriett Street.

that in 1926 an additional superstructure for another track was installed and the entire cost of this was paid for by the railroad.

Similarly, then, as now, there was practically no dispute as to the factual situation, the testimony and exhibits showing the desirability and need of widening the existing underpasses and providing more vertical clearance, the estimated cost of which was not challenged. There, as here, the issue resolved into a question of proper allocation of costs as between said parties.

The City of Los Angeles contends that the railroad should bear that portion of the costs which the existence of the railroad tracks adds to the cost of the proposed improvement. Under this contention it is argued that the City of Los Angeles should pay only that cost of widening the street which it would pay if there were no railroad crossing; all other costs, such as the cost of the bridge and its supports, should be borne by the railroad. The public, it is contended, should not be required to pay additional costs for street improvements when these additional costs are occasioned by the presence of the railroad.

The Santa Fe railroad takes the position that costs should be allocated according to benefits received. It contends that the railroad will receive no benefits from the proposed widening since it is now operating satisfactorily and the widening of the street will in no way change these [fol. 101] operations. As a matter of fact, the railroad contends the proposed improvements will actually be a detriment since there will be increased costs involved in maintaining the longer bridge. It contends that the need for widening the underpasses has arisen, not because of any activity of the railroad, but because of the increase in motor vehicle and pedestrian traffic. The record shows that at the present time the separation of grades is accomplished by means of two old underpasses and bridges constructed in 1914, which provide a roadway only 20 feet in width, with no facilities for pedestrian travel. Washington Boulevard has a 90-foot easement up to where it passes under Santa Fe's four tracks.

In 1932 these same parties were before this Commission in a similar proceeding involving the same two cross-

ings (4). At that time the proposal of the City of Los Angeles was to widen the two grade separations so that the roadway under them would have a width of 56 feet. This Commission issued its order authorizing widening of the grade separations and holding that the costs should be borne "25 per cent by The Atchison, Topeka and Santa Fe Railway Company and 75 per cent by applicant." The order further provided that the authorization therein granted should lapse and become void if not exercised within one year from the date thereof. The authorization was not exercised and, therefore, lapsed according to its terms, following a 60-day extension of its effective date (See Appendix "E" herein).

As pointed out by applicant, City of Los Angeles, in its closing brief, we cannot now fail to take note of the material change in conditions at the present time as compared to those in 1932, at the time of Decision No. 25069, supra. The great increase in population and the tremendous increase in motor vehicle traffic present a new problem.

As stated, the foregoing order having lapsed, the applicant, City of Los Angeles, on November 29, 1949, filed a [fol. 102] petition for rehearing of Decision and Order No. 43374, alleging that the decision was contrary to the law and the facts in that it assumed the city to be the principal beneficiary and disregarded the City's right to require the railroad to remove the tracks, that the proposed widening and increasing of the height of the underpasses are necessary in order to remove the railroad's interference with the City's easement for street purposes, which easement allegedly includes the "right to prevent any use of the ground beneath or the space above the easement in any manner which directly or indirectly interferes with the full utilization of such easement for street purposes," that the order of the Commission is in conflict with the Constitution of the State of California, Sections 6 and 8 of Article XI, in that the City "*receives no legal benefit from the* grade separation" since it allegedly has the right to "use its streets unimpeded and unhindered by the exist-

(4) Decision No. 25069, dated 8/15/32, in Application No. 18063, 37 CRC 784.

ence of the tracks," that the formula adopted by the Commission to allocate costs is prejudicial to the City and has been improperly and incorrectly applied, and that the railroad should be required "to pay the full cost of the proposed improvement which is attributable to the presence of protestant's tracks."

Under date of December 2, 1949, Santa Fe likewise filed a petition for rehearing alleging that the Commission's conclusion is erroneous and contrary to law in assessing certain costs to the railroad since the City is the sole beneficiary of the proposed structure, that the proposed structure actually will be a detriment to the railroad, that the "benefit" theory should be followed in assessing costs, and that the assessing of costs to the railroad amounts to a taking of property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States and Article I, Section 13 of the Constitution of the State of California.

The Commission's order granting a rehearing was issued March 28, 1950, and public hearings were held thereon before Commissioner Huls and Examiner Syphers on December 27 and 28, 1950, February 2 and 5 and March 19, 1951. [fol. 103] At the request of the parties, the Commission en banc heard oral argument on this matter on November 28, 1951. It was stipulated that all evidence in the prior hearings in this matter, leading to Decision No. 43374, supra, be incorporated into this record which was done.

The legal descriptions of the crossing of Washington Boulevard and (a) the Harbor Branch Line and (b) the main line of Santa Fe have previously been stated in footnotes 2 and 3, p. 3, herein.

The record discloses that Washington Boulevard is a public street extending from the westerly boundary of the City of Los Angeles at the Pacific Ocean in the Venice area, and easterly through the entire breadth of the City and then for a distance of several miles east of the easterly boundary of the City. The grade separations are in the City in an area which constitutes one of the principal industrial districts. Washington Boulevard throughout most of its length has a paved surface of at least 60 feet in width, with a few exceptions where the pavement width

varies from 40 to 60 feet. At the site of the existing grade separations, here under consideration, the roadway narrows down to 20 feet in width, and the vertical clearance is between 13 feet and 14 feet. The City's easement at this point is 20 feet.

The evidence in this case discloses that the rail lines in the area of Washington Boulevard were first turned over to the railroad's operating department on September 23, 1937, for the Harbor Line, and November 28, 1938, for the main line.

Alternative proposals for the construction with attendant costs are as detailed in pages 774 to 776 of Appendix A herein, the estimated over-all total of which preferred plan is $812,765, in conclusion as to which the instant Decision No. 37344 (Appendix A) stated as follows:

> "As previously pointed out herein, the estimated cost of the proposed structures which may be said to be attributable to the presence of the railroad tracks [fol. 104] for two divided span bridges is $569,355. The remaining costs are clearly attributable to the paving and widening of the street. We find that this amount of $569,355 is the amount of costs which should be allocated in this proceeding."
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> * * * * * * * * *
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> "We further find that The Atchison, Topeka and Santa Fe Railway Company shall bear fifty per cent (50%) of the said amount of $569,355, the costs to be allocated, hereinabove indicated, and the City of Los Angeles the remainder."

ARGUMENT.

There is no statutory requirement that this Commission follow any particular theory of allocation of costs.

Here, as in the past, this "opposite-as-the-poles" position respecting allocating of costs between the railroad and the city has not changed, the former contending that the costs should be allocated according to benefits received and the latter that the railroad should pay that portion of the

total cost which is attributable to the presence of the railroad tracks.

Here, under the theory advanced by the City of Los Angeles that the railroad should pay the additional costs of construction resulting from the presence of the tracks, the railroad's share would amount to 86 per cent of the total costs. Under the theory advanced by the railroad that it should pay according to the benefits it receives, and considering its contention that it receives no benefits, its contribution would be nothing. In the past, a more even division has generally obtained.

The Commission, however, did not subscribe to either contention, but after weighing the evidence in the light of the particular facts and based upon the entire record in the instant proceedings, allocated the cost equally as between Santa Fe and the City, *having previously found that neither party was devoid of benefits but that both would derive benefits from the proposed improvements herein ordered.* In so doing, it gave full consideration to the supplemental showings of the parties upon rehearing whereby the original allocation based upon the original or prior record of 1949 (Decision No. 43374), supra, was discarded and the present 50% allocation to each, based upon the consolidated and subsequently supplemented record, substituted therefor. (See Decision No. 47344, Appendix "A" herein.)

In support of its instant findings, opinion and order we quote the Commission:

> "The authority of this Commission to allocate costs, as designated in Section 1202 of the Public Utilities Code, supra, is an exercise of the police power on the part of the State of California through the medium of its agency, the Public Utilities Commission. We hold that the law is well established that under the exercise of the police power a state may regulate the crossings of railroads with its highways, and may require grade separations to be erected and maintained, apportioning the costs in the exercise of its sound discretion. (*Erie Railroad Company v. Board of Public Utilities Commissioners*, 1920, 254 U. S. 394; 65 L.

ed. 322; *Chicago, Milwaukee and Saint Paul Railway Company v. Minneapolis*, 1914, 232 U. S. 430; 58 L. ed. 671; *Missouri Pacific Railway Company v. Omaha*, 1914, 235 U. S. 121; 59 L. ed. 157; *Lehigh Valley Railroad Company v. Board of Public Utility Commissioners*, 1928, 278 U. S. 24; 73 L. ed. 161)." (Decision No. 47344, supra.)

"The railroad here contends that the modern development of the law in regard to apportionment of costs in grade separation cases has been toward the allocating of such costs according to the benefits received by the parties involved. In 1932, we are reminded, the same parties were before this Commission in a similar proceeding involving a proposed widening of the same two crossings. (Decision No. 25069, dated August 15, 1932, in Application No. 18063, 37 C.R.C. 784). The Commission's order authorized the widening, and held that the costs should be borne '25 per cent by the Atchison, Topeka & Santa Fe Railway Company and 75 per cent by applicant.' The Commission then said, 'In apportioning the costs of constructing these separations between applicant and the railroad company, due consideration should be given to the obligations of each party, as well as to the benefits derived.' However, this record discloses that material changes have taken place in conditions at the present time compared to those in 1932. As we said in Decision 43374, supra, 'The great increase in population and the tremendous increase in motor vehicle traffic present a new problem.'

"Likewise, the railroad relies rather strongly on the decision of the United States Supreme Court in *Nashville, Chattanooga and St. Louis Railway v. Walters*, 1934, 294 U. S. 405; 79 L. ed. 949. There an order [fol. 105] the State Commissioner of Highways requiring the railroad to construct and pay one-half the cost of an underpass at the intersection of the truck and a proposed state highway was held to be arbitrary and unreasonable since the railroad received no benefits from the proposed construction. In that case the highway involved was not designed to meet local transportation needs, but was a state highway intended to

be a link in the national transportation system, and the financing thereof was to come largely through Federal aid. ('Washington Boulevard in the vicinity of the underpasses here in question is not a freeway but is used as an access street to the adjacent properties.')

"In the instant case, the proposed widening of Washington Boulevard is to meet local transportation needs, and the City's contribution thereto must come entirely from local funds. (Otherwise stated, 'the costs will have to be met without any help from state funds according to this record.')

"In Decision No. 43374, supra, we said 'the railroad has a continuing obligation to participate in the cost of such an improvement as is contemplated. While we hold that the allocation of costs herein is an exercise of the police power, and that we are not bound to follow the benefit theory, we observe that this proposed improvement is not without benefits to the railroad. Because of the grade separation it can operate longer trains without experiencing delays at this location and without the hazard of grade crossing accidents. The proposed structure would result in a new bridge to replace one that is 75 per cent depreciated, and the new bridge would conform to the recommended 'live loading' (5) standards or Cooper ratings, whereas the present structures do not." (Appendix A, p. 782.)

Additionally, as regards Washington Boulevard, the record amongst other things discloses that the bridge over the Los Angeles River was built in 1931, and it was then that Washington Boulevard became a through street; that prior to that time the existing 20-foot underpasses were adequate, since they were used only by garbage trucks; that the present volume of traffic in the vicinity of the underpass exceeds by five per cent the volume as shown by the original or prior record herein; that traffic which

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(5) Standards of railroad bridges as set out under the specifications of the American Railway Engineers' Association as well as the recommendations made by that body.

normally uses Washington Boulevard is now being diverted [fol. 107] to other streets; that a speed and delay check of this area also indicates the present underpass to be a bottleneck to traffic; that the annual reports of Santa Fe reflect a rate of return of five per cent in 1949; that the executive director of the League of California Cities filed a resolution approving a formula for allocating costs, whereby the municipality would stand that portion of the total costs of building the improvements if there were no railroad tracks involved and that the railroad would bear that portion of the costs occasioned by the presence of the railroad tracks; that Santa Fe stock now sells for about $160 whereas ten years ago it was below $100; that petitioner herein, Santa Fe, has recently started a motor carrier operation in California known as the Santa Fe Transportation Company; that the manager of the Metropolitan Traffic and Transit Department of the Los Angeles Chamber of Commerce stated he believed the traffic in the area to be sufficient to justify construction of a six-lane underpass; that Santa Fe deeds and City ordinances relative to right of way for rail tracks and covering the crossings here involved are of record herein; that the present crossing structures here under consideration are not in accordance with standards recommended by the A.R.E.A.; that Washington Boulevard in the vicinity of the underpasses here in question is not a freeway but is used as an access street to the adjacent properties; that the preferred plan as herein adopted and prescribed sets out the construction which would be most practicable and best meet the public safety, convenience and necessity in this matter; that the proposed widening of Washington Boulevard is to meet local transportation needs; that the City's contribution thereto must come entirely from local funds; that the railroad has a continuing obligation to participate in the cost of such an improvement; that it is in the public interest to authorize the widening and increasing of the height of the existing underpasses of Washington Boulevard and the Harbor Branch Line and the main line railroads of Santa Fe and that said Santa Fe should bear fifty per cent (50%) of the aforesaid costs to be allocated

[fol. 108] and the City of Los Angeles the remainder, and that finally as to this latter it found:

"As previously pointed out herein, the estimated costs of the proposed structures which may be said to be attributable to the presence of the railroad tracks for two divided span bridges is $569,355. The remaining costs are clearly attributable to the paving and widening of the street. We find that this amount of $569,355 is the amount of costs which should be allocated in this proceeding." (Accordingly, $284,678 allocates to Santa Fe, page 9 of Petition.)

Petitioner, Santa Fe, Rebels Against Any Payments Whatsoever.

Petitioner, Santa Fe, rebels against paying any of the crossing construction costs thus allocated for the Washington Boulevard improvement owing to the asserted lack of accrual of direct monetary benefits to its railroad operations in support of which attitude it relies upon the single case of *Nashville, C. and St. L. R. Co.* v. *Walters*, supra, as to the asserted changed legal basis for its contentions both for this so-called "benefit theory" and its extraordinary demands that this Honorable Court embark upon a *trial de novo* for determination of both the law and the facts surrounding the instant regulatory proceeding. We here wish to disabuse the record of petitioner's inferential implications respecting both of such contentions.

The So-Called "Nashville Case Is Clearly Distinguishable From The Instant Situation.

At the outset it should be stated that the Nashville case is no authority for the inference or contention by petitioner that the law has now been changed so that railroads cannot be required to pay the cost of crossing improvements. In considering that case the following points should be noted:

One.

The Tennessee statute there involved did not confer any discretion upon the Commission, but instead required the railroad in every case to pay one-half of the cost of a grade separation. (79 L. ed. 949, at 954.) Here our statute gives

to the Commission discretion to allocate the costs and does [fol. 109] not purport to make an arbitrary assessment against the railroads.

Two.

In the *Nashville* case the railroad conceded "that in Tennessee, as elsewhere, the rule has long been settled that, ordinarily, the State, may, under its police power, impose upon a railroad the whole cost of eliminating a grade crossing, or such part thereof, as it deems appropriate." (p. 954.) The claim of unconstitutionality in that case rests wholly upon the special facts shown. Therefore the issue as to what portion of the cost should be borne by a railroad in a grade separation widening and clearance such as we are concerned with in this proceeding was not even an issue in the *Nashville* case. The railroad conceded that in such a case it could be required to pay the entire cost!

Three.

The only point decided by the Supreme Court of the United States was that the Supreme Court of Tennessee erred when it refused to consider the special facts in that case. And all the Supreme Court of the United States did was to remand the case to the Tennessee court for consideration of those special facts. The Supreme Court of the United States did not purport to determine that even under the special facts there involved it was unconstitutional to assess one-half of the cost against the railroad. Instead it expressly stated that it was not making such a determination which was, in the first instance, for determination by the Tennessee court. (p. 965.)

Included in evidence and the findings of the trial court which the Supreme Court of Tennessee refused to consider were:

(a) That the underpass was part of a state-wide and nation-wide plan to foster commerce by motor vehicle on the public highways;

(b) that the decision to build the underpass, its location and construction, was not in any proper sense an exercise of the police power, but rather, as set

forth in the bill of complaint, pursuant to a general [fol. 110] plan of internal improvement fostered by the Congress of the United States in conjunction with the several States to make a nation-wide system of super-highways in the interest of interstate commerce by motor vehicle, much of which is in active competition with the railroads themselves;

(c) that the underpass did not involve an exercise of the police power any more than many other features of this project, such as elimination of curves, grades, et cetera;

(d) the State highways of Tennessee (as distinguished from county and city roads and turnpikes) have their origin in the Federal-aid highway legislation. The aim of that legislation is a "connected system of roads for the whole Nation"; "to provide complete and economical highway transport throughout the Nation"; to furnish "a new means of transportation, no less important to the country as a whole that that offered by the railroads"; to establish "lines of motor traffic in interstate commerce." The immediate interest of the Federal Government is, in part, the national defense as well as the transportation of the mails;

(e) the relief of the unemployment incident to the business depression had been the main incentive for highway construction during the period in which the highway there in question was undertaken and completed;

(f) Lexington, the city there involved, was a rural community of 1823 inhabitants located in a sparsely settled territory. *The construction of the new highway with the underpass was not designed to meet local transportation needs.* It was undertaken to serve as a link in a nation-wide system of highways. State Highway No. 20, as formerly routed, passed through Lexington on Clifton Street, and crossed the railroad at grade; it was adequate for the existing traffic and that to be expected;

[fol. 111] (g) that the present facilities were deemed locally both safe and adequate was attested by the fact

that neither the city authorities, nor any one else, had suggested elimination of that grade crossing; that the grade crossing was to remain unchanged after the new highway was put into use; and that the Clifton Street route was continued to be used for the local traffic;

(h) the underpass was required for a new and additional highway over which State Highway No. 20 was being rerouted, which was to become a part of a Federal-aid route between Nashville and Memphis;

(i) the underpass was prescribed, *not upon consideration of local safety needs*, but in conformity to general plans of the Federal and State highway engineers, as being a proper engineering feature in the construction of a nation-wide system of highways for high speed motor vehicle transportation; and because it was the policy of the Federal authorities to make the avoidance of grade crossings a condition of a grant in aid of construction. *The requirement of the underpass*, and the payment by the Railway under the 1921 Tennessee Act of one-half the cost of separating the grades *were results of the Federal-aid legislation. Final payment of Federal aid on this project was conditioned upon commencement of the construction of this underpass.* (79 L. ed. pp. 956-961.)

In other words, the underpass there involved was constructed in order to qualify for Federal funds, not to meet local traffic needs.

It is obvious that the *Nashville* case is unique and no authority for the contention that the law has now been changed so that railroads cannot be required to pay the cost of eliminating a grade crossing and/or its necessary improvements.

As was stated by the Supreme Court of the United States in the *Nashville* case (at p. 964):

"* * * No case involving like conditions has been found in any of the lower Federal courts; nor, excepting the case here under review, has any such been found among the decisions of the highest courts of any state."

[fol. 112] This makes it abundantly clear that the Supreme Court of the United States did not intend that the *Nashville* case should be considered as reversing the long line of prior cases setting forth the railroads' responsibility in connection with grade separations and/or their improvements.

The elimination of a grade crossing when required, not for the purpose of local transportation needs or public safety, but for the purpose of qualifying for Federal aid (as was the situation in the *Nashville* case), is clearly distinguishable from the grade seperation improvements involved in the instant proceeding. In the *Nashville* case we have had a community of 1823 people in a sparsely settled area; here we have a grade crossing in a metropolitan area populated by several million persons. In the *Nashville* case we had the new interstate highway created, leaving untouched the existing grade crossing. In the instant proceeding we have a situation where local transportation needs require the improvement. No new route is being established. The existing city street is merely to be improved to the extent necessary to handle local transportation needs.

In the Nashville case the Supreme Court of the United States expressly recognized the principle of law which we here urge. The court stated (at p. 964):

> "It is also true that state action imposing upon a railroad the cost of eliminating a dangerous grade crossing of an existing street may be valid although it appears that the improvement benefits commercial highway users who make no contribution toward its cost; Chicago, B. & Q. Co. v. Nebraska, 170 U. S. 57, 75, 42 L. ed. 948, 954, 18 S. Ct. 513; Missouri P. R. Co. v. Omaha, 235 U. S. 121, 59 L. ed. 157, 35 S. Ct. 82, that a railroad has no constitutional immunity from having to contribute to the cost of safeguarding a crossing with another railway line, merely because the first railroad was built before the crossing was made; Detroit, T. W. & B. I. R. Co. v. Osborn, 189 U. S. 383, 47 L. ed 360, 23 S. Ct. 540; Northern P. R. Co. v. Puget Sound & W. H. R. Co., 250 U. S. 332, 63 L. ed. 1013, 39, S. Ct. 474, and that the State may, under some

circumstances, impose upon a railroad the cost of the grade separation for a new highway. But in every case in which this Court has sustained the imposition, the new highway was an incident of the growth or development of the municipality in which it was located. Northern P. R. Co. v. Minnesota, 208 U. S. 583, [fol. 113] 592, 52 L. ed. 630, 634, 28 S. Ct. 341; Cincinnati, I. & W. R. Co. v. Connersville, 218 U. S. 336, 54 L. ed. 1060, 31 S. Ct. 43, 20 Ann. Cas. 1206; Chicago M. & St. P. R. Co. v. Minneapolis, 232 U. S. 430, 58 L. ed. 671, 34 S. Ct. 400; Erie R. Co. v. Public Utility Comrs., 254 U. S. 394, 409, 65 L. ed. 322, 333, 41 S. Ct. 169, P. U. R. 1921C, 143. Compare Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 554, 58 L. ed. 721, 725, 34 S. Ct. 364 And in every such case the municipality apparently bore the cost of constructing the new highway for which grade separation was required."

It should also be emphasized that the Supreme Court of the United States expressly stated, in the *Nashville* case, at page 965:

"We have no occasion to consider now whether the facts presented by the Railway were of such persuasiveness as to have required the State court to hold that the statute and order complained of are arbitrary and unreasonable. That determination should, in the first instance, be made by the Supreme Court of the State. (Citing cases.) Moreover, since that court held the facts relied upon to be without legal significance, it did not inquire whether the findings were adequately supported by the evidence introduced in the trial court. The correctness of some of the findings is controverted by the State. Other facts of importance bearing upon the issue may possibly be deductible from the evidence, or be within the judicial knowledge of that court. When the scope of the police power is in question the special knowledge of local conditions possessed by the State tribunals may be of great weight. (Citing cases.) * * *."

It is our considered opinion that the *Nashville* case, when properly analyzed, clearly supports the proposition that,

in connection with a grade separation alteration such as we are here considering, the railroad can be required to pay the entire cost of the improvement, or such lesser amount as this Commission may deem proper. As was stated by Mr. Chief Justice Hughes in *Chicago, M. & St. P. R. Co. v. Minneapolis* (1914), 232 U. S. 430, 58 L. ed. 671, at page 674:

> *"It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings, but also to build and maintain suitable bridges or viaducts to carry highways newly laid out, over their tracks, or to carry their tracks over such highways."* (Emphasis added.)

The foregoing, incidentally, answers any contentions of the petitioner as to asserted property right to cross Washington Boulevard and the relative insignificance as to [fol. 114] whether the railroad or street was first placed in use since the record shows the City's 90-foot easement for street purposes at the location here involved.

Allocation of Cost Theories.

Respecting a proper allocation of the costs of grade crossing improvements here involved, we have previously commented as to petitioner's rail "profit" theory and the City's refusal to subscribe to such theory because as, the latter contends, it is impossible to compute rail benefits with any degree of certainty; it completely disregards the legal rights of said city to use its streets free from obstruction or interference; and it further disregards the legal obligations inherent in the operation of the railroad.

The respondent, The City of Los Angeles, has, in brief, stated what it believes to be the only equitable method of allocating costs of grade separation matters giving full consideration to the legal rights of the City and of the Railroad as follows:

> "It is our considered opinion that the proper basis of allocating expenses of a grade separation is to require the City to pay the amount which it would cost the City to improve the city street in the manner proposed if there were no railroad tracks, and to require

the railroad to pay the additional cost resulting from and necessitated by the presence of the railroad tracks. As has been stated:

"* * * The true basis of apportionment of the cost has been declared by this court to be the extent to which the presence of the railroad at the place enhances the cost of a necessary improvement.' (*State of Missouri ex rel. Wabash R. Co.* v. *Public Service Comm.*, 100 S. W. 2d 522, 109 A. L. R. 754; *State ex rel. Kansas City Terminal R. Co.* v. *Public Service Comm.*, 272 S. W. 957.)

"This formula can be applied with mathematical exactness in every case and gives full and proper consideration to both the legal and equitable principles applicable to grade separation."

Similarly, as reflected by the official record herein, the League of California cities by the following resolution sets forth its belief as to the equitable and legal method of [fol. 115] allocating costs of grade separations and improvements thereof, and reading, in part, as follows:

"Now, Therefore, Be It Resolved, that the Board of Directors of the League of California Cities hereby officially goes on record as approving, as the proper formula to be used in connection with the allocation, between a municipality and a railroad, of the cost of a new grade separation, or the improvement of an existing grade separation, the following formula:

(a) Allocate to the municipality that portion of the the total cost which represents the amount which it would cost the municipality to make the necessary improvement to its street if there were no railroad tracks involved;

(b) Allocate to the railroad such portion of the total cost which is occasioned by the presence of the railroad; that is, allocate to the railroad such portion of the total cost as the presence of the railroad enhances the cost of a necessary improvement;

Such formula to be applied in all cases where a city street, as distinguished from a state highway, is involved." (Exhibit No. 53 R. H.)

The Fact That Review In California Is Limited To The Record Before The Commission Presents No Constitutional Infirmity.

Reverting to the second and last contention of petitioner for the asserted right to retry a regulatory proceeding coming from the Commission, where, as here, the statute requires the review to be determined solely upon the record of the Commission and prohibiting this Court from taking additional evidence, we wish to quote the language of the Supreme Court in *Alabama Public Service Commission* v. *Southern Railway Company*, 341 U. S. 341, 348-349, 95 L. ed. 1002, 1008, to wit:

> "The fact that review in the Alabama Courts is limited to the record taken before the Commission presents no constitutional infirmity. Washington ex rel Oregon R. & N. Co. v. Fairchild, 224 U. S. 510, 56 L. ed. 863, 32 S. Ct. 535 (1912). And, whatever an alleged denial of constitutional rights is in issue, it is now settled that a utility has no right to relitigate factual questions on the ground that constitutional rights are involved. New York v. United States, 331 U. S. 284, 334-336, 91 L. ed. 1492, 1528-1530, 67 S. Ct. 1207 (1947); Railroad Commission of Texas v. Rowan & Nichols Oil Co., 311 U. S. 570, 576, 85 L. ed. 358, 362, 61 S. Ct. 343 (1941)."

[fol. 116] In attempted support of petitioner's contention for trial de novo, it has resorted to a rule heretofore announced in the Ben Avon Case, infra, that a utility is entitled to a judicial determination of both the law and the facts in a regulatory proceeding.

While not of controlling importance, as far as this proceeding is concerned, we wish to call this Court's attention to the fact that the Supreme Court has repudiated the rule which it announced in the case of *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287, 289, 64 L. ed. 908, 914, with Justices Brandeis, Holmes, and Clarke strongly dissenting. As lawyers are generally aware, that rule was of little practical value because courts were not inclined to try regulatory proceedings *de novo*. Particularly, this Court, under the limited statutory review existing, could

not retry a regulatory proceeding coming from the Commission because the statute requires the review to be determined solely upon the record of the Commission, the statute prohibiting this Court from taking additional evidence. Such a limited review by the Courts is constitutional. (*Alabama Public Service Commission v. Southern Ry. Co.* 341 U. S. 341, 348-349, 95 L. ed. 1002, 1008.) Obviously, the rule that a utility was entitled to the determination by a Court on both the law and the facts could have little utility where judicial review is limited to the record made before the regulatory body. The philosophy and attitude of this Court towards this subject has been clearly and elaborately stated in the case of *Southern California Edison Co. v. Railroad Commission*, 6 Cal. (2d) 737, at pages 746-749, and comment thereon would be superfluous. Over the years, the Ben Avon rule has been eroded and devitalized by the Courts themselves until the Supreme Court of the United States, in the cases of *Railroad Commission v. Rowan & Nichols Oil Co.*, 310 U. S. 573, 581-582, 584, 84 L. ed. 1368, 1373, 1374; Id. 311 U. S. 570, 85 L. ed. 358; *New York* v. *U. S.*, 331 U. S. 284, 334-336, 91 L. ed. 1492, 1528-1530; *Alabama Public Service Commission* v. *Southern Ry. Co.*, 341 U. S. 341, 348, 349, 95 L. ed. 1002, [fol. 117] 1008, finally rejected that rule, although the Ben Avon decision was not expressly overruled. A reading of these cases clearly demonstrates the repudiation of the rule. Following is the language of the Supreme Court on the point in the *Alabama Public Service* Commission case, supra:

> "The fact that review in the Alabama Courts is limited to the record taken before the Commission presents no constitutional infirmity. Washington ex rel. *Oregon R. & N. Co.* v. *Fairchild*, 224 U. S. 510, 56 L. ed. 863, 32 S. Ct. 535 (1912). And, whatever the scope of review of Commission findings when an alleged denial of constitutional rights is in issue, it is now settled that a utility has no right to relitigate factual questions on the ground that constitutional rights are involved. *New York* v. *United States*, 331 U. S. 284, 334-336, 91 L. ed. 1492, 1528-1530, 67 S. Ct. 1207 (1947); *Railroad Commission of Texas* v. *Rowan & Nichols*

Oil Co., 311 U. S. 570, 576, 85 L. ed. 358, 362, 61 S. Ct. 343 (1941)." (*Alabama Public Service Commission, et al. v. Southern Railway Company*, 341 U. S. 341, 348-349, 95 L. ed. 1002, 1008.)

In view of the fact that the Supreme Court of the United States—the Court that prescribed the Ben Avon rule—no longer follows said rule, surely there is no reason why this Court should follow it. The fact that the Public Utilities Act was amended in 1933 in formal compliance with the Ben Avon rule could not perpetuate the rule in California after the father of the rule has disowned it.

The Weight of Judicial Decision in the Great Majority of Cases Clearly Supports the Findings, Opinion and Order of Respondent, Public Utilities Commission.

In the absence of constitutional or valid statutory limitations, the State and its duly authorized political subdivisions have full power and authority, both at common law and under the federal constitution, to require separation of grades at crossings of public streets and highways by railroads and to require the railroads to pay as much as the entire cost thereof and to repair and maintain the separation structures after their construction. This is a proper exercise of police power by or on behalf of the sovereign.

In the case of *Erie Railroad Co. v. Board of Public Utility Comrs.* (1920), 254, U. S. 394, 65 L. ed. 322, an order had been made by the Board of Public Utility Com- [fol. 118] missioners of New Jersey requiring the Erie Railroad to install grade separations at fifteen street crossings in the city of Paterson. Fourteen of these crossings were required to be made by means of underpassed streets and the fifteenth by means of a viaduct carrying the street over the railroad. The order required the railroad company to pay the entire cost of all of these separations, with the exception that 10% of the cost was required to be borne by a streetcar company which occupied three of the crossings. Most of the streets involved were laid out later than the railroad tracks. The railroad company insisted that compliance with the order would result in its bankruptcy and attacked the order on the grounds that it was

unreasonable, arbitrary and a violation of the due process and interstate commerce clauses of the federal constitution. In affirming the order the Supreme Court of the United States, speaking through Mr. Justice Holmes (254 U. S. 412, 65 L. ed. 339), said:

"Streets ordinarily call for a necessary adjustment of two conflicting interests—that of the public using the streets, and that of the railroads and the public using them. Generically the streets represent the more important interest of the two. There can be no doubt that they did when these railroads were laid out, or that the advent of automobiles has given them an additional claim to consideration. They always are the necessity of the whole public, which the railroads, vital as they are, hardly can be called to the same extent. Being places to which the public is invited, and that it necessarily frequents, the state, in the care of which this interest is, and from which, ultimately, the railroads derive their right to occupy the land, has a constitutional right to insist that they shall not be made dangerous to the public, whatever may be the cost to the parties introducing the danger. That is one of the most obvious cases of the police power; or, to put the same proposition in another form, the authority of the railroads to project their moving masses across thoroughfares must be taken to be subject to the implied limitation that it may be cut down whenever and so far as the safety of the public requires. It is said that if the same requirement were made for the other grade crossings of the road, it would soon be bankrupt. That the state might be so foolish as to kill a goose that lays golden eggs for them has no bearing on their constitutional rights. If it reasonably can be said that safety requires the change, it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil. (Citing cases.) To engage in interstate commerce the railroad must get on to the land; and, to get on to it, must comply with the condi-

liens imposed by the state for the safety of its citizens. Contracts made by the road are made subject to the possible exercise of the sovereign right. (Citing cases.) If the burdens imposed are so great that the road cannot be run at a profit, it can stop, whatever the misfortunes the stopping may produce. (Citing cases.) Intelligent self-interest should lead to a complete consideration of what the road is able to do without ruin, but this is not a constitutional duty. In the opinion of the courts below the evidence justified the conclusion of the board that the expense would not be ruinous."

In *Chicago, M. & St. P. R. Co. v. Minneapolis* (1916), 232 U. S. 430, 58 L. ed. 671, the city of Minneapolis had acquired certain property for park purposes which included two lakes in their entirety and a portion of the shores of a third lake, together with large tracts of land in the vicinity. It proceeded to construct two roads connecting the three lakes, together with walks on either side thereof. The railroad owned a right of way 300 feet wide which crossed the path of one of the proposed roads and the city sought to condemn an easement for this road and for bridges across this right of way. The railway tracks at the point in question were located on an artificial embankment 12 feet above the water level of the lakes. It was agreed that the city should take the land and construct the road and walks and that the railway company should build the bridges according to plans prepared by the city, but the railway company reserved the right to recover damages or compensation in the condemnation action and, likewise, in addition to the value of the land taken (which was paid), that it should be compensated for the extra cost of the necessary bridge across the canal and such further sum as would be sufficient to maintain the bridge. The judgment in the condemnation case awarded to the railroad only the value of the land taken together with the cost of certain features of the bridge which were purely ornamental. In affirming the judgment the Supreme Court of the United

Baxter, speaking through Mr. Justice Hughes, said (282 U. S. 537, 75 L. ed. 474):

[fol. 139] "The question thus presented is whether the railroad is under compensation for the cost of constructing and maintaining the necessary railroad bridge across the gap in the right of way, made by the building of the canal, amounts to a deprivation of property without due process of law.

"It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings, but also to build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their tracks, or to carry their tracks over such highways. . . . ."

Quoting from a Minnesota case the court proceeds:

" 'A railroad company receives its charter and franchise subject to the implied right of the state to establish and open such streets and highways over and across its right of way as public convenience and necessity may, from time to time, require. That right on the part of the state attaches by implication of law to the franchise of the railroad company, and imposes upon it an obligation to construct and maintain at its own expense suitable crossings at new streets and highways to the same extent as required by the rules of the common law at streets and highways in existence when the railroad was constructed.' . . . (Citing cases.)

"Under the doctrine of these decisions, it necessarily follows that if the city of Minneapolis had opened a public road through the embankment of the plaintiff in error, the latter would have had no ground to complain that its constitutional rights had been violated because it was compelled to bridge the gap at its own cost. No different rule could be applied because the highway was laid out in order to increase the advantages of a public park. In this aspect, it would be equally a crossing devoted to the public use (citing cases); and we see no basis for a distinction in principle in the case of an intersecting public road opened

under competent authority because such a highway might lead to public recreation grounds instead of to places of business, or might connect lakes instead of avenues."

In *Missouri Pacific R. Co. v. Omaha* (1914), 235 U. S. 121, 59 L. ed. 157, the city of Omaha by ordinance required the railroad to construct a viaduct over its line at its intersection with Dodge Street, together with approaches thereto along the southerly line of Dodge Street, leaving the northerly side of the street open to public traffic. The ordinance required construction of the viaduct in accordance with plans and specifications prepared by the city [fol. 121] engineer. The railroad brought this action in the federal courts. The Circuit Court (which was then the federal court of original jurisdiction) dismissed the bill and this decree was affirmed both by the Circuit Court of Appeals and the Supreme Court of the United States. The latter court, speaking through Mr. Justice Day, said (235 U. S. 127, 59 L. ed. 160):

"That a railway company may be required by the state, or by a duly authorized municipality acting under its authority, to construct overhead crossings or viaducts at its own expense, and that the consequent cost to the company as a matter of law is *damnum absque injuria*, or deemed to be compensated by the public benefit which the company is supposed to share, is well settled by prior adjudications of this court. (Citing cases.)

"This is done in the exercise of the police power, and the means to be employed to promote the public safety are primarily in the judgment of the legislative branch of the government, to whose authority such matters are committed, and so long as the means have a substantial relation to the purpose to be accomplished, and there is no arbitrary interference with private rights, the courts cannot interfere with the exercise of the power by enjoining regulations made in the interest of public safety which the legislature has duly enacted. (Citing cases.)"

In *Lehigh Valley R. Co. v. Board of Public Utility Comrs.*, (1928), 278 U. S. 24, 73 L. ed. 161, the railroad sought to enjoin enforcement of an order made by the Board of Public Utility Commissioners of New Jersey requiring the railroad to eliminate two railroad grade crossings and to substitute in their place a single overhead crossing at the sole expense of the railway company in the amount of $324,000. In addition to raising the usual constitutional objections, the railroad claimed that an adequate crossing could be built for at least $100,000 less than the amount it was required to expend under the order and also claimed that the order unconstitutionally imposed a direct burden on interstate commerce and violated the interstate commerce law in that the required expenditures exceeded the legal duties of the railroad and the reasonable requirements of public safety and convenience. The case was instituted in the United States District Court and was heard by a three-judge court which dismissed the bill. On appeal [fol. 122] the Supreme Court affirmed the decree of dismissal and, speaking through Mr. Chief Justice Taft, said (278 U. S. 33, 73 L. ed. 166):

> "This highway is not infrequently crowded with vehicles. When route No. 29 is completed, it will certainly be more crowded. The immediate prospect of using new route 29 makes greater room in the roadway most desirable. The large expenditure to secure such advantages does not seem to be arbitrary or wasteful when made for two busy highways instead of one.
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> "It is not for the court to cut down such expenditures merely because more economical ways suggest themselves. The board has the discretion to fix the cost. The function of the court is to determine whether the outlay involved in the order of the board is extravagant in the light of all the circumstances, in view of the importance of the crossing, of the danger to be avoided, of the probable permanence of the improvement and of the prospect of enlarged capacity to be required in the near future and other considerations similarly relevant.
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(278 U. S. 34, 73 L. ed. 167): "A railroad company in maintaining a path of travel and transportation across a state, with frequent trains of rapidity and great momentum, must resort to reasonable precaution to avoid danger to the public. This court has said that where railroad companies occupy lands in the state for use in commerce, the state has a constitutional right to insist that a highway crossing shall not be dangerous to the public, and that where reasonable safety of the public requires abolition of grade crossings, the railroad can not prevent the exercise of the police power to this end by the excuse that such change would interfere with interstate commerce or lead to the bankruptcy of the railroad. (Citing cases.) This is not to be construed as meaning that danger to the public will justify great expenditures unreasonably burdening the railroad, when less expenditure can reasonably accomplish the object of the improvements and avoid the danger. If the danger is clear, reasonable care must be taken to eliminate it and the police power may be exerted to that end. But it becomes the duty of the court, where the cost is questioned, to determine whether it is within reasonable limits.

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(278 U. S. 35, 73 L. ed. 167): "The care of grade crossings is peculiarly within the police power of the states (citing cases), and if it is seriously contended that the cost of this grade crossing is such as to interfere with or impair economical management of the railroad, this should be made clear. It was certainly [fol. 123] not intended by the Transportation Act to take from the states or to thrust upon the Interstate Commerce Commission investigation into parochial matters like this, unless by reason of their effect on economical management and service, their general bearing is clear."

So zealously have the courts guarded the police power of the states and their political subdivisions with respect to railway crossings of highways that they have held in numerous cases where municipalities have by contract

agreed with railway companies to pay the expense of maintenance and repair of grade separation structures after their construction, that such contracts are void as against public policy since they constitute the virtual abdication of sovereign powers, it being said in such cases that the "police power cannot be contracted away." See for examples: *Chicago M. & St. P. R. Co.* v. *Minneapolis* (1914), 232 U. S. 430, 58 L. ed. 671, and *Northern Pacific R. Co.* v. *Minnesota ex rel. Duluth* (1907), 208 U. S. 583, 52 L. ed. 630. In the latter case the court, speaking through Mr. Justice Day, said (208 U. S. 596, 52 L. ed. 636):

> "There can be question as to the attitude of this court upon this question, as it has been uniformly held that the right to exercise the police power is a continuing one, that it cannot be contracted away, and that a requirement that a company or individual comply with police regulations without compensation is the legitimate exercise of the power, and not in violation of the constitutional inhibition against the impairment of the obligation of contracts. (Citing cases.) . . . We find no error in the judgment of the Supreme Court of Minnesota holding the contract to be void and beyond the power of the city to make, and it will, therefore, be affirmed."

In *State ex rel. Alton R. Co.* v. *Public Service Commission* (Mo. 1934), 70 S. W. 2d 57, 60, the Supreme Court of Missouri, in upholding an order of the Public Service Commission authorizing the widening of a concrete viaduct over a railroad, said:

> "The state has the right to build its other public highways, for travel by other means, over, across, or under the railroad. To accommodate such travel, it has the right to build new roads across railroads at new places and provide for the necessary kind of crossing, or to widen existing roads and alter such crossings already established, as the public interest may in either case reasonably require. *If it did not, it would no longer be the sovereign.* To exercise its police power for the preservation of the public safety, [fol. 124] this state has through the Legislature desig-

nated the Public Service Commission as the exclusive agency to determine and prescribe the manner and point of new crossings and to alter or abolish established crossings, apportion the expense, either of making new crossings or alterations of existing ones, and to provide for their maintenance.

"'*Salus populi suprema lex est*' is the fundamental principle of the police power of the state, as well as our state motto. Private corporations, accorded the privilege of operating railroads, declared to be public highways of the state, for the purpose of private profit, must pay a reasonable proportion of the cost of improvements, which the presence of their tracks make or contribute to make necessary, for the welfare and safety of the people of the state. We therefore hold that the Public Service Commission has the authority not only to provide for a separation of a grade between a public highway and a railroad, when conditions make that necessary and proper, but that it also has the power, whenever the manner of crossing formerly prescribed by it becomes inadequate in width, height, or strength, to reasonably provide for the safety and welfare of the traveling public thereon, to order it reconstructed to meet their reasonable needs." (Emphasis added.)

A review of the decisions of the respondent Public Utilities Commission and its predecessor Railroad Commission of California will show that throughout their history they have uniformly recognized the principle that this State has the right and the power to impose upon a railroad all or any part of the cost of grade separations including their alteration, relocation, or abolishment.

Petitioner has stated that the Commission has adopted the so-called benefit theory as a proper basis for the apportionment of costs but the decisions cited by it do not support such contention.

The *Goshen Junction* case, 38 C.R.C. 380 (1933) involved a state highway to be paid in part with Federal-aid funds for highway construction, in the course of which the Commission took cognizance of the then existing depression and expressly gave consideration to "the economic situa-

tion, particularly at this time when revenues from practically all sources are materially below what they have been in the immediate past." Said facts are borne out by the respondent Commission, Decision No. 25069 of August 15, 1932, reported in 37 C.R.C. 784, 786-787, as hereinbefore cited and in which it specifically repudiated the so-called "benefits theory" of apportioning grade separation improvement costs in these words:

> [fol. 125] "The matter of direct financial benefits is not the sole test of the determination of the respective portions which the railroad and public should contribute toward the cost of such improvement. In apportioning the costs of constructing these separations between applicant and the railroad company, due consideration should be given to the obligations of each party, as well as the benefits derived. It should be recognized that the railroad has a continual obligation to participate in the matter of constructing and maintaining reasonable and adequate crossings over its tracks, both at grade and at separated grades. This obligation is inherent, notwithstanding the fact that the traffic on the railroad may increase or decrease."

Other citations of the kind by petition appear so widely different, factually speaking, as not to require detailed analysis herein.

Decision Of The Public Utilities Commission Carries A Strong Presumption Of Validity.

In weighing contentions of petitioner's unconstitutionality, this Court must keep ever in mind that the decision assailed is supported by a strong presumption of validity. (*St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 53, 80 L. ed. 1033, 1042; *Market St. Ry. Co.* v. *Railroad Commission*, 24 Cal. (2d) 378, 399; *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 602, 88 L. ed. 333, 345; *San Francisco* v. *Industrial Accident Commission*, 183 Cal. 273.)

Decision No. 47344 Of The Public Utilities Commission Has The Same Force And Effect As A Statute Enacted By The Legislature.

The Public Utilities Commission is a constitutional body to which has been delegated legislative authority, and its decisions in the execution of such legislative authority have the same force and effect as a statute enacted by the Legislature. All the presumptions of validity which surround a statute enacted by the Legislature based upon an exertion of the police power support the decision herein. The test of the constitutionality applicable to a statute applies equally to the constitutionality of the decision involved herein. (*Pacific States Box & Basket Co.* v. *White*, 296 U. S. 176, 185-186, 80 L. ed. 138, 146; *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U. S. 55, 69, 81 L. ed. [fol. 126] 510, 518; *Lewis* v. *Potomac Elec. Pr. Co.* (U. S. Ct. of Appeals, D. C.), 64 F (2d) 701, 702.)

The United States Supreme Court in the case of *Pacific States Box & Basket Co.* v. *White*, supra, 296 U. S. 176, 185-186, 80 L. ed. 138, 146, discussed the rule as follows:

> "* * * The order here in question deals with a subject clearly within the scope of the police power. See *Turner* v. *Maryland*, 107 U. S. 38, 27 L. ed. 370, 2 S. Ct. 44. When such legislative action 'is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary.' *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194, 209, 79 L. ed. 281, 288, 55 S. Ct. 187.
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> "It is urged that this rebuttable presumption of the existence of a state of facts sufficient to justify the exertion of the police power attaches only to acts of legislature; and that where the regulation is the act of an administrative body, no such presumption exists, so that the burden of proving the justifying facts is

upon him who seeks to sustain the validity of the regulation. The contention is without support in authority or reason, and rests upon misconception. Every exertion of the police power, either by the legislature or by an administrative body, is an exercise of delegated power. Where it is by a statute, the legislature has acted under power delegated to it through the Constitution. Where the regulation is by an order of an administrative body, that body acts under a delegation from the legislature. The question of law may, of course always be raised whether the legislature had power to delegate the authority exercised. Compare *Panama Ref. Co.* v. *Ryan*, 293 U. S. 388, 79 L. ed. 446, 55 S. Ct. 241, and *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 79 L. ed. 1570, 55 S. Ct. 837, 97 A.L.R. 947. But where the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies. Compare *Aetna Ins. Co.* v. *Hyde*, 275 U. S. 440, 447, 72 L. ed. 357, 364, 48 S. Ct. 174."

Decision Of The Commission Does Not Constitute An Unlawful Or Other Burden On Interstate Commerce.

Petitioner asserts that the decision of the Commission constitutes an unlawful burden upon interstate commerce. [fol. 127] The decision of the Commission shows and the fact is reflected by the petition for review that the instant intrastate improvement is not without substantial railroad benefits and considering the recorded financial status of petitioner, cannot remotely retard interstate commerce. Also, the petitioner concedes that its overall operations in California are profitable. It makes no contention that the decision herein will render confiscatory the return of petitioner on its California operations.

In such circumstances, the rule is elementary that a State may require the continuation of railroad service at a financial loss and that such requirement raises no issue under the Federal Constitution. (*Alabama Public Service Commission* v. *Southern Ry. Co.*, 341 U. S. 341, 347, 352-353, 95 L. ed. 1002, 1007, 1010.) This rule has been consistently

followed by the Supreme Court of the United States and this Court's attention is called to the following decisions of that Court on the subject: *Missouri Pac. Ry. Co.* v. *Kansas*, 216 U. S. 262, 277-280, 54 L. ed. 472, 478-480; *Atlantic Coast Line R. Co.* v. *North Carolina*, 206 U. S. 1, 23-27, 51 L. ed. 933, 943-945; *United Fuel Gas Co.* v. *Railroad Commission*, 278 U. S. 300, 308-309, 73 L. ed. 390, 396; and see the many cases cited by Mr. Justice Frankfurter in his concurring opinion in the *Alabama Public Service Commission* case, supra, at pp. 352-353 of the U. S. Report.

Petitioner does not categorically assert that a State has no authority to burden or regulate interstate commerce but it might be inferred that such contention is being made by petitioner from the propositions advanced by it. We desire to call to this Court's attention the rule laid down by the Supreme Court of the United States that a State may, lawfully, *burden* interstate commerce and regulate it so long as State authority does not discriminate against such commerce. (*South Carolina State H. Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 189, 82 L. ed. 734, 741; *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U. S. 329, 333, 95 L. ed. 993, 998; *Railway Express Agency* v. *New York*, 336 U. S. 106, 111, 93 L. ed. [fol. 128] 533, 539; *Kelly* v. *Washington*, 302 U. S. 1, 9-15, 82 L. ed. 3, 10-13; *Cities Service Gas Co.* v. *Peerless O. & G. Co.*, 340 U. S. 179, 186, 95 L. ed. 190, 202.)

This Court May Not Substitute Its Judgment For That Of The Public Utilities Commission.

Petitioner has cited numerous decisions from other jurisdictions calculated to create the inference, at least, that Courts will substitute their judgment for the judgment of the regulatory body. Whether some States follow such a rule has no application here for the reason that the decisions of this Court and the plain provisions of Sections 1756-1760 of the Public Utilities Code compel the conclusion that this Court has no authority to substitute its judgment for the judgment of the Commission. (*Southern California Edison Co.* v. *Railroad Commission*, 6 Cal. (2d) 737, 746-749.)

Furthermore, the Supreme Court of the United States has held in an unbroken line of decisions that Courts must

not substitute their judgment for that of regulatory bodies. (*St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 51, 80 L. ed. 1033, 1041; *Railroad Commission of Texas, et al. v. Rowan & Nichols Oil Co.*, 310 U. S. 573, 581, 582, 584, 84 L. ed. 1368, 1372, 1374, pointing out that a Court must not substitute its judgment for that of the regulatory body *even though the evidence is convincing that the judgment of the Court is better than the result arrived at by the regulatory body*; *Railroad Commission of Texas* v. *Rowan & Nichols Oil Co.*, 311 U. S. 570, 85 L. ed. 358; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 596-597, 85 L. ed. 368, 377-378.)

This rule is not altered or varied, *even though the facts are not in dispute*. Such a state of the record makes no difference. (*Gray* v. *Powell*, 314 U. S. 402, 412, 86 L. ed. 301, 310.)

Mr. Justice Holmes, speaking for the Supreme Court of the United States, stated the rule very succinctly as follows:

> [fol. 129] "It is enough if we cannot say that it was *impossible* for a fair-minded board to come to the result which was reached." (Emphasis supplied.) (*San Diego Land & Town Co.* v. *Jasper*, 189 U. S. 439, 441-442, 47 L. ed. 892, 894.)

The Jurisdiction And The Authority Of The Public Utilities Commission.

By Article XII, Sections 17, 19, 20, 21, 22, 23, and 23a of the Constitution of the State of California, and the Public Utilities Act (Stats. 1915, Chap. 91), the Public Utilities Commission is given plenary and exclusive authority over public utilities in this State.

Section 22 of Article XII provides in part as follows:

> "No provision of this Constitution shall be so construed as a limitation upon the authority of the Legislature to confer upon the Public Utilities Commission additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred upon the Public Utilities Commission in this Constitution, and the authority of the Legislature to confer such additional powers is ex-

pressly declared to be plenary and unlimited by any provision of this Constitution."

Section 23 of Article XII provides in part as follows:

"* * * The railroad commission (Note: Now Public Utilities Commission) shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the state of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the legislature, and the right of the legislature to confer powers upon the railroad commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution."

This equivalent provision is contained in Section 23a of said Article XII.

The Legislature may confer on the Commission any and all authority it possesses over public utilities and in addition it may confer powers upon the Commission that the Legislature itself could not exercise because of constitutional restriction imposed directly upon the Legislature. The only restraint imposed upon the Legislature in conferring powers upon the Commission pursuant to said Article XII is that afforded by the Federal Constitution.

The foregoing constitutional provisions and the Public [fol. 130] Utilities Act have received interpretation at the hands of this Court, and the plenary authority conferred thereby has been broadly upheld. *Pacific Tel. & Tel. Co.* v. *Eshleman*, 166 Cal. 640, 650, 689; *Clemmons* v. *Railroad Commission*, 173 Cal. 254, 258; *City of San Jose* v. *Railroad Commission*, 175 Cal. 284, 290; *Miller* v. *Railroad Commission*, 9 Cal. (2d) 190, 195, 198; *Sale* v. *Railroad Commission*, 15 Cal. (2d) 612, 617.

In *Sale* v. *Railroad Commission*, supra, this Court stated, at pages 617 and 618, as follows:

"* * * A court is a passive forum for adjusting disputes, and has no power either to investigate facts or to initiate proceedings. Litigants themselves largely determine the scope of the inquiry and the data upon which the judicial judgment is based.

"The powers and functions of the Railroad Commission are vastly different in character. It is an active instrument of government charged with the duty of supervising and regulating public utility services and rates. (Cal. Const., art. XII, secs. 22, 23.) The Constitution gives the legislature full authority to implement the commission's powers with legislation germane to public utility regulation, and under this authority the legislature has departed from traditional techniques of judicial procedure. The commission has the right and duty to make its own investigations of fact, to initiate its own proceedings and in a large measure to control the scope and method of its inquiries. (See Public Utilities Act, *supra passim*; 15 Cal. L. Rev. 445.) All hearings, investigations and proceedings are governed by the provisions of the act and by rules of practice and procedure adopted by the commission. 'No informality * * * shall invalidate any order, decision, rule or regulation made * * *' (Public Utilities Act, *supra* sec. 53.) *Hence, unless the act required the commission to proceed in a certain way, the only limitation upon its procedural powers is its duty to provide a fair hearing to any party whose constitutional rights may be affected by a proposed order.*" (Emphasis added.)

The Constitutionality Of A Statute Will Only Be Passed Upon Where Absolutely Necessary.

It is a well-established general rule that the constitutionality of a statute will be passed on only if, and to the extent that, it is directly and necessarily involved in a justiciable controversy and is essential to the protection of the rights of the parties concerned. Such determination must be ab- [fol. 131] solutely necessary in order to determine the merits of the case in which the constitutionality of the statute has been drawn into question. This is such a basic and well-established rule of this Court and of the United States Supreme Court that but a few of the leading decisions are cited herein: *State of Texas* v. *Interstate Commerce Commission*, 258 U. S. 158, 66 L. ed. 531; *Arkansas Fuel Oil Co.* v. *State of Louisiana*, 304 U. S. 197, 82 L. ed.

1287; *Franklin v. Peterson*, 87 C. A. (2d) 727, 730; *Great Western Power Co. v. City of Oakland*, 189 Cal. 689; *In re Herman*, 183 Cal. 152, 160 16 Corpus Juris Secundum 207, Sec. 94.

Petitioner, through its wholly owned subsidiary—Santa Fe Transportation Company—operates both as a "passenger stage corporation" and as an unrestricted certificated highway common carrier of general freight throughout the most populous and highly commercialized territories of California, including the metropolitan areas involved.

One of the complaints of petitioner, Santa Fe, to this Honorable Court is that the Public Utilities Commission in its Rehearing Order (Decision No. 47544, Appendix A, herein) authorizing and directing the enlarging of the existing inadequate and sub-standard underpass at Washington Boulevard, is playing into the hands of the commercial trucks thereby forcing Santa Fe to subsidize its competitors, (See Petition, pp. 9 and 10), owing to the admitted increased use of such improvements by the motor vehicle industry of California, and, as a justification for its unprecedented revolt against paying any part of the instant crossing improvements, we quote petitioner:

> "* * * The use of automobiles, buses, and trucks has increased tremendously, and highway carriers have taken over an increased proportion of all commercial transportation by use of larger, wider, higher, and faster automotive equipment and would reap the greatest benefit from the proposed construction. * * * That the factor of delay—particularly as to the commercial trucking industry—is the most important factor necessitating the proposed enlargement of the existing grade separations."

This is amazing and interesting, indeed, when consider-[fol. 132] ing the comparatively recent pleas and showings of petitioner's wholly owned subsidiary—Santa Fe Transportation Company, in P.U.C. certification Decisions Nos. 43006, 43365, and 43624, of June 14, October 4, and December 13, 1949, respectively (Reported in order named in 48 Cal. P.U.C. 712; 49 Cal. P.U.C. 98; and 49 Cal. P.U.C. 272.) for a highway common carrier certificate from respondent

—Public Utilities Commission of California—for commercial motor vehicle transportation of all general commodities between northern and southern California and intermediate points, embracing the very territory here involved.

The major point then and there stressed by petitioner in bolstering its claims of public convenience and necessity was its need for the said greater highway trucking speeds to offset railroad delays and, more especially, to match its commercial automotive trucking rivals—Pacific Motor Transport Company (wholly owned subsidiary of Southern Pacific Company) and others—throughout the highways of California, and, too, the proffered very highly standardized equipment at all times thus assured through the financial support guaranteed by parental backing—The Atchison, Topeka and Santa Fe Railway Company system.

It followed, how that record reflected the quaking of the smaller, less powerful, and less richly endowed highway carrier industry of the State at the inevitable impact of another such Goliath importing bigger, higher, wider, longer, faster and more powerful trucks backed by "bigger" money. Thus it is to inquire of petitioner just how said higher automotive speeds for its freight and passengers has promoted or can promote the public safety, be it underpass, overpass or at grade.

Furthermore, judicial notice undoubtedly will be taken of petitioner Santa Fe's twin operation, namely, its highway common carriage of passengers by motor buses (including high-powered articulated equipment) throughout the State by the same subsidiary, and in which passenger bus operations petitioner, Santa Fe railroad engages in [fol. 133] its own railway name as well. (6)

It ill behooves petitioner, therefore, to have spearhead

(6) For example, in addition to the above quoted recent cases, see P.U.C. Decisions Nos. 31028 of June 27, 1938; 27234 of July 20, 1934; 41414 of March 30, 1948; 30790 of April 18, 1938; and a long list of others enlarging and extending the petitioner's automotive freight and passenger service areas between Northern and Southern California and intermediate territories.

a drive for the overthrow of the regulatory statutes to which it has looked and continues to apply for both authorization and protection in its daily three-way performance of rail, truck, and bus operations as described, merely because of a fifty-fifty allocation of cost for this doubly needed widening of 20-foot roadways under its quadruple tracks so as to enable its own super trucks and buses to move safely join in this aforesaid automotive parade of the tax-paying public at large which, after all, supports the highways of California.

Surely, such a public utility may not avail itself of the benefits provided by law (Public Utilities Code of California, for example) and deny the burdens created by those same laws as a part of the contract of dedication to the public use. Quite obviously, the advocacy of petitioner's proposed "benefits" theory looks to the maximum advantages and other gains that may accrue from manifold operative rights about the State without the assumption of the attendant obligations—responsibilities and liabilities—imposed by the self same law. Strive as we may, we are at a loss to understand the "consistency" of this petitioner in its present attack on the instant decision. For petitioner seemingly forgets or has here ignored the fact that were it not for these ever increasing millions of motorists, truckers, passengers, and pedestrians (comprising the general shipping and traveling public) against which it here complains, it would have neither freight for its rail cars and trucks nor passengers for its coaches and buses [fol. 136] only official representative or prospective customer in California. And we sincerely trust that this Honorable Court will have no act as to refresh petitioner's memory that under provisions of the California Constitution and Section 67 of the Public Utilities Act (Now Public Utilities Code) there exist certain limitations against the sort of blanket review it here seeks; that the presumption of regularity is to be indulged with respect to Commission orders as here involved; that findings of fact by the Commission properly are to be accorded due weight in decision and order predicated thereon; and that if in the record thus builded by the Public Utilities Commission of Cali-

fornia there is to be found any substantial evidence to justify said Commission's decision its order will not be annulled and set aside.

Summary and Conclusion

In the instant situation, we respectfully urge that this Honorable Court is limited to a determination of whether the Commission has regularly pursued its authority including whether the order or decision in question violated any right of petitioner under the Constitution of the United States or of the State of California.

Summarized, the Court will appreciate the rather voluminous record in this matter, the copious pleadings, including opening, closing, and reply briefs, the extensive testimony and the numerous exhibits by the parties, and the fact that more than a full week of public hearings, including rehearing and oral argument before the Commission en banc, was accorded the parties herein before taking the matter under submission. And when it is considered that the carefully calculated costs themselves are not in controversy but only their apportionment as between opposing parties with their differing formulae, and that although the Commission did not adopt the method advocated by either petitioner Santa Fe or the City of Los Angeles, but basing its findings, opinions and order upon the entire record and in its discretion found for an even [fol. 136] division of the lesser of the two alternative construction plans, it must be clear that said order of the Commission was within its power and supported by the evidence and is reasonable and in conformity with the law. In so doing, it assuredly gave full and fair hearing to the parties, including petitioner, in the regular pursuit of its authority within the powers conferred by the statutes and the Constitution, hence its observance and the safeguarding of procedural due process.

Certainly, the Commission did not act hastily or arbitrarily, nor did it exceed its authority or abuse its discretion by ordering an equitable, just and reasonable allocation of the lesser of two alternative costs for the necessary improvement of Washington Boulevard crossing on behalf of the public interest involved. On the contrary, it is sub-

mitted that petitioner's claim to confiscation is wholly without merit and that it has not shown, in the slightest degree, that any of its statutory or constitutional rights have been violated.

For these and the additional reasons herein, coupled with the leading authorities therefor, as hereinbefore cited, it is contended that the Commission regularly pursued its authority and violated no right of petitioner and that the petition for a writ of review herein should be denied.

Respectfully submitted, /s/ Everett C. McKeage, Everett C. McKeage, /s/ Hal F. Wiggins, Hal F. Wiggins, /s/ Harold J. McCarthy, Harold J. McCarthy, Attorneys for Public Utilities Commission of the State of California.

Dated, San Francisco, California, September 12, 1952.

[fol. 136-138] Proof of Service

(omitted in printing)

[fol. 139] Appendix "A" to Answer

Decision No. 47344, Application No. 29396

(June 24, 1952)

Upon rehearing the City of Los Angeles authorized to widen, improve and increase the vertical clearance of the Washington Boulevard underpass under the main Harbor branch line tracks of the Atchison, Topeka and Santa Fe Railway Company, and the cost thereof apportioned.

(1a, 1b) Crossings—Grade Separations—Division of Costs. The law is well established that, under the exercise of the police power a state may require grade separation and also apportion the costs thereof. Section 1202 of the Public Utilities Code has vested such power in the Commission. The Commission is under no obligation to follow any particular theory, but must allocate costs fairly in the exercise of its sound discretion.

Roger Arnebergh, Assistant City Attorney for the City of Los Angeles, applicant. *Joseph H. Cummins*

and *Robert W. Walker*, for The Atchison, Topeka & Santa Fe Railway Company, protestant. *E. E. Bennett*, for Union Pacific Railroad Company, *Randolph Karr*, for Southern Pacific Company, *W. G. O'Barr*, for Los Angeles Chamber of Commerce, *Fred G. Seig*, for Order of Railway Conductors and *Robert C. Neill*, for California Fruit Growers Exchange, interested parties.

Opinion on Rehearing

By Decision No. 42374, dated October 4, 1949, on Application No. 29396, the City of Los Angeles was authorized to widen and increase the height of the existing under-[fol. 140] passes of Washington Boulevard and the Harbor Branch Line and the main line railroads of The Atchison, Topeka & Santa Fe Railway Company, in the manner therein prescribed and subject to certain specified conditions. The decision further provided that the expense of constructing the undergrade crossings was to be borne by the City of Los Angeles with the exception of the sum of $95,160, which amount was to be borne by The Atchison, Topeka & Santa Fe Railway Company. Subsequently, the effective date of this order was extended sixty days.

Under date of November 22, 1949, the City of Los Angeles filed a petition for rehearing alleging that the decision was contrary to the law and the facts in that it assumed the City to be the principal beneficiary and disregarded the City's right to require the railroad to remove the tracks, that the proposed widening and increasing of the height of the underpasses are necessary in order to remove the railroad's interference with the City's easement for street purposes, which easement allegedly includes the "right to prevent any use of the ground beneath or the space above the easement in any manner which directly or indirectly interferes with the full utilization of such easement for street purposes," that the order of the Commission is in conflict with the Constitution of the State of California, Sections 6 and 8 of Article XI, in that the City "receives no legal benefit from the grade separation" since it allegedly has the right to "use its streets unimpeded and unhindered by the existence of the tracks," that the for-

mula adopted by the Commission to allocate costs is prejudicial to the City and has been improperly and incorrectly applied, and that the railroad should be required "to pay the full cost of the proposed improvement which is attributable to the presence of protestant's tracks."

Under date of December 2, 1949, The Atchison, Topeka & Santa Fe Railway Company likewise filed a petition for rehearing alleging that the Commission's conclusion is erroneous and contrary to law in assessing certain costs to the railroad since the City is the sole beneficiary of the proposed structure, that the proposed structure actually will be a detriment to the railroad, that the "benefit" theory should be followed in assessing costs, and that the assessing of costs to the railroad amounts to a taking of property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States and Article 1, Section 13 of the Constitution of the State of California.

The Commission's order granting a rehearing was issued March 28, 1950, and public hearings were held thereon before Commissioner Huls and Examiner Syphers on December 27 and 28, 1950, February 2 and 5 and March 19, 1951. On these dates evidence was adduced and on the last-named date the matter was submitted, with the parties being given the right to file briefs. The last of these briefs was filed June 29, 1951. At the request of the parties, the Commission en banc heard oral argument on this matter on November 28, 1951. It is now ready for decision.

[fol. 141] At the hearing all parties entered into a stipulation to the effect that all evidence in the prior hearings in this matter, leading to Decision No. 43374, supra, be incorporated in this record. This stipulation was accepted.

The crossings which it is proposed to widen and to increase in height are described as follows: Crossing No. 2H-0.1-B is the numerical designation of the crossing of Washington Boulevard and the Harbor Branch line. Its legal description is:

> That portion of the right of way, 66 feet wide, of The Atchison, Topeka & Santa Fe Railway Company (formerly of the California Central Railway Company), described in Deed recorded in Book 491, page

106, of Deeds, Records of said County, included within the lines of Washington Boulevard, 90 feet wide, at Harriett Street.

Crossing No. 2-143.2-B is the numerical designation of the crossing of Washington Boulevard and the main line of applicant. Its legal description is:

That portion of the right of way, 100 feet wide, of The Atchison, Topeka & Santa Fe Railway Company (formerly of the California Central Railway Company), described in Deed recorded in Book 491, page 106, Case No. 6855 of the Superior Court of the State of California in and for the County of Los Angeles, a copy of which judgment is recorded in Book 361, page 77, of Deeds, Records of said County, included within the lines of Washington Boulevard, 90 feet wide, at Harriett Street.

The record discloses that Washington Boulevard is a public street extending from the westerly boundary of the City of Los Angeles at the Pacific Ocean in the Venice area, and easterly through the entire breadth of the City and then for a distance of several miles east of the easterly boundary of the City. The grade separations are in the City in an area which constitutes one of the principal industrial districts. Washington Boulevard throughout most of its length has a paved surface of at least 60 feet in width, with a few exceptions where the pavement width varies from 40 to 60 feet. At the site of the existing grade separations, here under consideration, the roadway narrows down to 20 feet in width, and the vertical clearance is between 13 feet and 14 feet. The City's easement at this point is 90 feet.

The evidence in this case discloses that the rail lines in the area of Washington Boulevard were first turned over to the railroad's operating department on September 23, 1887, for the harbor line, and November 24, 1888, for the main line (Exhibit No. 64 R.H.).

The present grade separations were constructed in 1914 in accordance with an agreement between the City of Los Angeles and The Atchison, Topeka & Santa Fe Railway

[fol. 142] Company. The costs of the structures were borne one-half by the City and one-half by the railway. In 1926 an additional superstructure for another track was installed, and the cost of this addition was paid for in its entirety by the railway.

The applicant City of Los Angeles, during the course of the original hearings, presented three proposals: (1) to fill in the present separation and have the crossings at grade (2) to use the present grade separations for eastbound traffic and to build a new westbound roadway at grade and (3) to widen and increase the height of the existing underpasses. This third proposal is the one which is preferred by applicant. At the second hearing an engineer for the Bridge Division of the City of Los Angeles testified that this proposal, as shown on Exhibit No. 13 of the original hearing (1), is still included in the City's plans.

The original estimated cost of this proposal was as follows:

Two span-deck girder railway bridges,		
One west of Harriett Street	$192,000	
One east of Harriett Street	204,000	$396,000
Structure wing walls and walls between structures		79,800
Storm drain, sewer		240,550
Slope rights		5,750
Total		$722,100

However, at the rehearing, the prior estimates of cost (Exhibits No. 14 and No. 15) were revised upwards as set out in Exhibits No. 21 R.H. and No. 22 R.H. The preferred proposal contemplates two bridges with deck girders of rolled, wide flange beam construction on two spans, providing two 43.5-foot openings with a median pier. Each

(1) The exhibits introduced at the original hearing were numbered from 1 to 20, inclusive, those at the rehearing from 21 R.H. to 63 R.H.

opening would have a 33-foot roadway for three lanes of traffic and a 7-foot pedestrian walk (2).

There was also advanced another proposal to have two 70-foot clear span, through-girder type of bridges, having a single roadway of 56 feet between curbs and two 7-foot walks for pedestrians.

The revised estimates of costs of these proposed structures follows:

Two clear span bridges:		
Bridge aA-1	$252,700	
Bridge aA-144	258,600	$511,300
Retaining and wing walls		57,845
		$569,145
Two divided span bridges:		
Bridge aA-1	$234,000	
Bridge aA-144	246,200	$480,200
Retaining and wing walls		89,155
		$569,355

[fol. 143] In addition to the foregoing costs, there will be additional costs for a storm drain sewer and also for slope rights.

In Decision No. 43374 we pointed out that the roadway on the Washington Boulevard bridge crossing the Los Angeles River is only 56 feet in width. Because there are no intervening streets between this bridge and the underpasses here in question and because of the short distance between the underpasses and the bridge, the width of the bridge roadway was held to be a limitation to the carrying capacity of the street.

The engineer for the Bridge Division of the City of Los Angeles presented testimony to the effect that it is entirely practical to widen this bridge. Exhibit No. 23 R.H. shows

(2) The details of this proposal are set out in Exhibits 9, 10, 11 and 13.

three possible ways of doing this and Exhibit No. 24 R.H. shows the estimates as to costs thereof. The plan preferred by the witness would provide a 66-foot roadway with two 5-foot 10-inch sidewalks and would cost $122,081. One of the other plans would provide a 60-foot roadway and two 5-foot 10-inch sidewalks at a cost of $100,959, while the remaining plan would provide a 60-foot roadway and one 5-foot 10-inch sidewalk at a cost of $17,580.

While the City or Los Angeles has no immediate plans for widening this bridge, it was the opinion of the witness that this should be done if the underpasses are widened as proposed.

The engineer of Street and Parkway Design for the City of Los Angeles testified that, in his opinion, the proposed underpass should make full use of the present 90-foot right of way and that to construct an underpass of 56 feet now would not be wise since it would be too difficult to widen in the future. Also, it was pointed out that the advisable procedure would be to widen the underpass first and then widen the Los Angeles River bridge, the contention being made that the traffic needs justify such construction.

If the two divided span bridges are constructed, as recommended by the City, there would be two 33-foot roadways, permitting three 11-foot lanes in each direction. In addition, sidewalk facilities should be provided and the recommendation was that they be seven feet wide, one for each roadway.

Exhibit No. 25 shows the estimated total cost of this construction to be as follows:

Bridges	$480,200	
Walls	89,155	
Slopes	5,750	$575,105
Storm drain	——	152,660
Street work	——	72,810
Sewer	10,350	——
Traffic safety devices	1,840	12,190
		$812,765

Of the above amounts it was estimated that all of the cost of the bridges, walls and slopes, amounting to $575,105, [fol. 144] and slightly more than one-third of the cost of the storm drain and street work, amounting to $125,910, or a total of $701,015, were costs necessitated by the presence of the railway. In other words, the cost to the City, if the railroad were not present, would be as follows:

Storm drain	$50,900
Street work	48,660
Sewer	10,350
Traffic safety devices	1,840
	$111,750

If this construction is carried out, the costs will have to be met without any help from state funds, according to this record.

Further testimony indicated that the bridge over the Los Angeles River was built in 1931 and it was then that Washington Boulevard became a through street. Prior to that time the existing underpasses were adequate, since they were used only by garbage trucks.

The principal traffic engineer of the City of Los Angeles referred to the prior record, Decision No. 43374, supra, and indicated that the present volume of traffic in the vicinity of the underpass exceeds by five per cent the volume as shown by said prior record. Likewise he reiterated that traffic which normally would use Washington Boulevard is now being diverted to other streets. Exhibit No. 26 R.H. shows the traffic volume in the area, as of Wednesday, December 1, 1948, and also as of Wednesday, December 13, 1950. This exhibit corroborates the above testimony. Exhibit No. 27 R.H., a speed and delay study of this area, also indicates the present underpass to be a bottleneck to traffic.

Exhibit No. 28 R.H. is a record of the accidents which occurred in the area and were reported to the Police Department during the period from February 2, 1948 to February 2, 1951. In this connection the general claim agent for Santa Fe presented testimony that the railroad has had no costs for property damage or personal injury

claims at this underpass. There has been but one claim, wherein an automobile hit the bridge but there was no liability on the part of the railroad.

A consulting engineer, testifying on behalf of the railroad, presented testimony and exhibits in relation to the problem. It was his opinion that widening the underpasses would increase the railroad's costs but would not increase its business. Further, any need for widening or increasing the height of the underpasses is occasioned by highway traffic and not by railroad operations. In the opinion of this witness, the financial soundness of a railroad could be undermined by placing on it too great a share of the cost of grade separations. In this instance, he pointed out, the widening of the underpasses would provide no benefit to the railroad, but actually would be a detriment because of the added expense to the railroad of maintaining a larger structure.

[fol. 146] Exhibit No. 29 R.H. is a study compiled by this witness in support of the opinions hereinabove indicated, containing a rather detailed study of the relationship of highways to railroads and the resultant problems of their crossings both at separations and at grade. Among other items, this exhibit contains data showing the grade separations constructed in California during 1948 and 1949, the cost, and the railroads' contributions, if any. Out of the thirty cases listed, five were financed under the Federal Aid Secondary Program and twenty-five were financed out of State funds. Twenty-seven were cases in which the railroad made no contribution, while in the remaining three, one Federal Aid and two State fund projects, the railroads' contribution ranged from 0.5 per cent to 15.4 percent. All of these thirty constructions were new grade separations and not, as herein proposed, widening of existing overpasses. It was the opinion of this witness that a railroad derived more benefit from a new separation, where the disadvantages of a grade crossing are removed, than from the enlarging of existing structures where the railroad already has the advantage of an existing separation.

In Exhibit No. 31 R.H., this witness amplified this testimony by listing all of the grade separations constructed in California since 1920, showing the percentage of cost

allocated to the railroad in each instance, and in Exhibit No. 30 R.H. he set out the total revenues of the various types of carriers in California. The revenues of highway carriers varied from 63.9 per cent of the total for all carriers in 1938, to 73.7 per cent in 1949, the low during this period occurring in 1940 at 65.3 per cent and the high in 1946 at 74.1 per cent.

This witness likewise presented a suggested plan for allocating costs of construction at grade crossings, which plan is set out in Exhibit No. 32 R.H. Further testimony of this witness related to population and motor vehicle registrations (Exhibit No. 33 R.H.), the highways in the area (Exhibit No. 34 R.H.), the general background of rail and highway development, and also some material on the present needs of the highway traffic in the area concerned.

Other witnesses for the railroad reiterated the contention that the widening of these underpasses would provide no benefit to the railroad. The annual reports of the Santa Fe to this Commission were placed in this record by stipulation. While they indicate the railroad to be receiving a rate of return of five per cent net in 1949, yet the witnesses strongly contended that to assess any part of the cost of this grade separation to the railroad would place a financial burden on it without any benefit to the railroad being derived therefrom.

A representative of the Order of Railway Conductors testified that in the opinion of the group he represented the cost to the railroad should be limited to ten per cent.

[fol. 146] The executive director of the League of California Cities filed a resolution, Exhibit No. 53 R.H., which resolution approved a formula of allocating costs, whereby the municipality would stand that portion of the total costs of building the improvements if there were no railroad tracks involved and that the railroad would bear that portion of the cost occasioned by the presence of the railroad tracks. Additional testimony produced by the railroad related to the average annual rate of return from 1930 to 1949 for all class one railroads in the United States and, individually, for The Atchison, Topeka & Santa Fe, Southern Pacific and Union Pacific railroads (Exhibit No. 35 R.H.). The same witness also testified, upon cross-exami-

nation, that the Santa Fe stock now sells for about $160 whereas ten years ago it was below $100.

The income of the railroad, as shown by its Federal income tax returns for the years 1930 to 1949, was received in evidence as Exhibit No. 63 R.H.

It was also pointed out that recently this company has started a motor carrier operation in California known as the Santa Fe Transportation Company.

Exhibits 37 and 38 R.H. show the accident record and claim costs for a five-year period at certain crossings of the Santa Fe Railroad with various highways. The railroad contended that the most hazardous crossings are in rural areas where there is high-speed auto travel and also high-speed train travel and that there are less accidents at city crossings.

A three-day traffic count of motor vehicles using Washington Boulevard was made in the vicinity of the underpasses here concerned during the days of November 27 and 29 and December 1, 1950 (Exhibits Nos. 39, 40 and 41 R.H.). It was stated by the railroad witness that the only congestion during this traffic count was an eastbound traffic which was blocked at Soto Street.

The bridge engineer for the railroad presented estimates as to the costs of various types of bridges which could be constructed to replace the existing structures (Exhibit No. 42 R.H.). He also called attention to the fact that the Union Pacific Railroad has a bridge across Washington Street east of Soto Street. This bridge provides for four lanes of traffic and could not be widened without great expense. Photographs of this bridge were presented as Exhibits Nos. 43 to 46 R.H. and an elevation drawing of this bridge was submitted as Exhibit No. 47 R.H. This same witness likewise presented the "as built" plans for the existing underpasses here in question, Exhibits 48 and 49 R.H. Other railroad witnesses testified that a four-lane bridge at the existing underpasses might sufficiently meet the needs of traffic.

The manager of the Metropolitan Traffic and Transit Department of the Los Angeles Chamber of Commerce stated he believed the traffic in the area to be sufficient to justify construction of a six-lane underpass.

[fol. 187] Various documents of title were introduced into the record both by the Santa Fe and the City of Los Angeles. Exhibits Nos. 50 to 52 R.H. show the Santa Fe's deeds relating to the right of way for its rail tracks in the area, and Exhibits Nos. 54 to 58 R.H. are additional documents introduced by the City relative to the right of way.

Exhibit No. 59 R.H. is composed of copies of franchises from the City of Los Angeles issued to the Santa Fe Railroad covering various crossings and, in particular, one of the underpasses here under consideration.

An engineer of the City of Los Angeles presented testimony pertaining to several grade separations which have been built in recent years in the Los Angeles area. Exhibit No. 60 R.H. shows details of some of these underpasses. Exhibit No. 61 R.H. shows the "live loading" standards of railroad bridges as set out under the specifications of the American Railway Engineers' Association, as well as the recommendations made by that body. According to the witness, the present structures here under consideration were not in accordance with the recommended standards.

The City of Los Angeles further presented a land use map of Washington Boulevard between Alameda Street and Soto Street (Exhibit No. 62 R.H.) tending to show that Washington Boulevard in the vicinity of the underpasses here in question is not a freeway but is used as an access street to the adjacent properties.

After a careful consideration of all of the evidence adduced herein, and in the light of the evidence adduced in the original hearings, having the benefit of the briefs and oral arguments which have been presented, we conclude to affirm our prior findings to the effect that there is a need for widening and increasing the height of the existing underpasses.

We also find that the preferred plan of the City of Los Angeles, as set out in Exhibit No. 13, heretofore described, sets out the construction which would be most practicable and best meet the public safety, convenience and necessity in this matter.

Our question herein, therefore, is primarily one of cost. If the proposed underpasses are constructed, who shall bear the expense? The positions of the parties have not

changed since the prior hearings. Throughout these proceedings the City of Los Angeles has contended that the railroad should pay that portion of the total cost which is attributable to the presence of the railroad tracks. Under this contention it is the City's position that it should pay only that cost of widening the street which it would pay if there were no railroad crossing, and all other costs, including the cost of the bridge and its supports, should be borne by the railroad.

[fol. 148] It has been the position of the railroad throughout these proceedings that the costs should be allocated according to benefits received. It contends that the railroad will receive no benefits from the proposed structures since it now is operating in a satisfactory manner over the present structures, and the widening of the street will in no way change these operations. As a matter of fact, it is the railroad's position that the construction of new structures will actually be a detriment, since there will be increased costs in their maintenance. The railroad further contends that the need for new structures has not arisen because of any railroad operations, but rather because of the increased motor vehicle and pedestrian traffic in the vicinity.

In the light of the particular facts in this record, we do not subscribe to either contention. Previously, in Decision No. 43374, we held that, due to the width of the existing bridge over the Los Angeles River, and giving consideration to the length of the proposed structure, as well as to the length of the existing structure, 40 per cent of the cost attributable to the presence of the railroad tracks should be allocated one-half to the railroad and one-half to the City.

In the light of the facts presented at the rehearing, particularly with reference to the possibilities of widening the existing bridge over the Los Angeles River, and also with reference to the costs of the various structures proposed, as hereinbefore set out, we find that the method of allocating costs, as set out in Decision No. 43374, should be discarded.

(1b) The authority of this Commission to allocate costs

in this matter stems primarily from Section 1202 of the Public Utilities Code, from which we quote in part:

> "The commission has the exclusive power:
>
> "(b) To alter, relocate, or abolish by physical closing any such crossing heretofore or hereafter established.
>
> "(c) To require, where in its judgment it would be practicable, a separation of grades at any such crossing heretofore or hereafter established and to prescribe the terms upon which such separation shall be made and the proportions in which the expense of the construction, alteration, relocation, or abolition of such crossings or the separation of such grades shall be divided between the railroad or street railroad corporations affected or between such corporations and the State, county, city, or other political subdivision affected."

There is no statutory requirement that this Commission follow any particular theory of allocation of costs. Under the theory advanced by the City of Los Angeles that the railroad should pay the additional costs of construction resulting from the presence of the tracks, the railroad's share would amount to about 96 per cent of the [fol. 149] total costs. Under the theory advanced by the railroad that it should pay only according to the benefits it receives, and considering its contention that it receives no benefits, its contribution would be nothing.

The authority of this Commission to allocate costs, as designated in Section 1202 of the Public Utilities Code, supra, is an exercise of the police power on the part of the State of California through the medium of its agency, the Public Utilities Commission. (1a) We hold that the law is well established that under the exercise of the police power a state may regulate the crossings of railroads with its highways, and may require grade separations to be erected and maintained, apportioning the costs in the exercise of its sound discretion. (*Erie Railroad Company* v. *Board of Public Utility Commissioners*, 1920, 254 U. S. 394; 65 L. ed. 322; *Chicago, Milwaukee and Saint Paul Railway Company* v. *Minneapolis*, 1914, 232 U. S. 430; 58 L. ed. 671;

Missouri Pacific Railway Company v. Omaha, 1918, [illegible] U. S. 126; 59 L. ed. 157; *Lehigh Valley Railroad Company v. Board of Public Utility Commissioners*, 1928, 278 U. S. 24; 73 L. ed. 161).

The railroad here contends that the modern development of the law in regard to apportionment of costs in grade separation cases has been toward the allocating of such costs according to the benefits received by the parties involved. In 1932, we are reminded, these same parties were before this Commission in a similar proceeding involving a proposed widening of the same two crossings. (Decision No. 25009, dated August 16, 1932, in Application No. 18063, 27 C.R.C. 784). The Commission's order authorized the widening, and held that the costs should be borne "25 per cent by The Atchison, Topeka & Santa Fe Railway Company and 75 per cent by applicant." The Commission then said, "In apportioning the costs of constructing these separations between applicant and the railroad company, due consideration should be given to the obligations of each party, as well as to the benefits derived." However, this record discloses that material changes have taken place in conditions at the present time as compared to those in 1932. As we said in Decision 43374, *supra*, "The great increase in population and the tremendous increase in motor vehicle traffic present a new problem."

Likewise, the railroad relies rather strongly on the decision of the United States Supreme Court in *Nashville, Chattanooga and St. Louis Railway v. Walters*, 1934, 294 U. S. 405; 79 L. ed. 949. There an order of the State Commissioner of Highways requiring the railroad to construct and pay one-half the cost of an underpass at the intersection of the tracks and a proposed state highway was held to be arbitrary and unreasonable since the railroad received no benefits from the proposed construction. In that case the highway involved was not designed to meet local transportation needs, but was a state highway intended to [fol. 130] be a link in the national transportation system, and the financing thereof was to come largely through Federal aid.

In the instant case, the proposed widening of Washington Boulevard is to meet local transportation needs, and

the City's contribution thereto must come entirely from local funds.

In Decision No. 43374, *supra*, we said "the railroad has a continuing obligation to participate in the cost of such an improvement as is contemplated." While we hold that the allocation of costs herein is an exercise of the police power, and that we are not bound to follow the benefit theory, we observe that this proposed improvement is not without benefits to the railroad. Because of the grade separation it can operate longer trains without experiencing delays at this location and without the hazard of grade crossing accidents. The proposed structure would result in a new bridge to replace one that is 75 per cent depreciated, and the new bridge would conform to the recommend "live loading" standards or *Cooper* ratings whereas the present structures do not.

As previously pointed out herein, the estimated costs of the proposed structures which may be said to be attributable to the presence of the railroad tracks for two divided span bridges is $569,355. The remaining costs are clearly attributable to the paving and widening of the street. We find that this amount of $569,355 is the amount of costs which should be allocated in this proceeding.

After a full consideration of all of the evidence, briefs and oral argument presented in this matter, we hereby find it to be in the public interest to authorize the widening and increasing of the height of the existing underpasses of Washington Boulevard and the Harbor Branch Line and the main line railroads of The Atchison, Topeka & Santa Fe Railway Company, in accordance with the preferred plan of the City of Los Angeles as previously described herein. We further find that The Atchison, Topeka & Santa Fe Railway Company shall bear fifty per cent (50%) of the said amount of $569,355, the costs to be allocated, hereinabove indicated, and the City of Los Angeles the remainder.

Order on Rehearing

Application as above entitled having been filed, a hearing and rehearing having been held thereon, and the Commission being fully advised in the premises,

It is ordered that the City of Los Angeles be, and it

hereby is, authorized to widen and increase the height of the existing underpasses of Washington Boulevard and the Harbor Branch Line and the main line railroads of The Atchison, Topeka & Santa Fe Railway Company in the manner and at the locations more particularly described [fol. 151-152] in the foregoing opinion, and substantially in accordance with the plan introduced in evidence in this proceeding, subject to the following conditions:

1. Fifty per cent (50%) of the costs of the proposed structures attributable to the presence of the railroad tracks, as defined in the foregoing opinion, excluding the costs attributable to the paving and widening of the street shall be borne by The Atchison, Topeka & Santa Fe Railway Company, and the remainder of the costs shall be borne by the City of Los Angeles.

2. In the event applicant elects to construct said undergrade crossings, the cost of maintaining those portions of the separations which, for the purpose of this decision, shall be referred to as the superstructures, which shall be deemed to be everything above the bridge seats, shall be borne by The Atchison, Topeka & Santa Fe Railway Company. The remainder of the maintenance of said structures shall be borne by applicant.

3. Prior to the commencement of construction, applicant shall file with this Commission for approval a set of plans for the proposed alterations of the grade separation crossings, which plans shall have been approved by The Atchison, Topeka & Santa Fe Railway Company, or bear a statement as to why the said railway company refuses to approve such plans. In the event the said railway company refuses to approve such plans, this Commission may issue supplementary orders in this matter.

4. The crossing shall be constructed with clearances conforming to the provisions of General Order 26D of this Commission.

5. Within thirty (30) days thereafter, applicant shall notify this Commission, in writing, of the completion of the installation of said crossings and of its compliance with the conditions hereof.

6. The authorization herein granted shall lapse if

not exercised within one (1) year after the date hereof unless further time is granted by subsequent order.

The effective date of this order shall be sixty (60) days after the date hereof.

Dated at San Francisco, California, this 24th day of June, 1952.

Mittelstaedt, Creamer, Huls, Potter, Mitchell, Commissioners.

[fol. 153-154] APPENDIX "B" TO ANSWER.

Decision No. 47622

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of THE CITY OF LOS ANGELES, a municipal corporation, for an order or orders authorizing and requiring the widening, increasing the vertical clearance and improving of the crossings of Washington Boulevard and the Harbor Branch Line and the Main Line railroads of The Atchison, Topeka & Santa Fe Railway Company, designating the portions of the work to be done respectively by said city and by said railroad corporation and allocating the cost thereof between said city and said railroad corporation.	Application No. 29396

ORDER DENYING REHEARING

The Atchison, Topeka and Santa Fe Railway Company having filed its petition for rehearing respecting Decision No. 47344, rendered by the Commission herein on June 24, 1952, the Commission having considered said petition for rehearing and being of the opinion that no cause has been shown for the granting of the same,

It is ordered that said petition for rehearing be and the the same is hereby denied.

Dated, San Francisco, California, this 26th day of August, 1952.

Justus F. Craemer, Harold P. Huls, Kenneth Potter, Peter E. Mitchell Commissioners.

Certified as a True Copy, Noel Coleman, Asst. Secretary, Public Utilities Commission, State of California.

[fol. 155-156] APPENDIX "C" TO ANSWER.

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of THE CITY OF LOS ANGELES, a municipal corporation, for an order or orders authorizing and requiring the widening, increasing the vertical clearance and improving of the crossings of Washington Boulevard and the Harbor Branch Line and the Main Line railroads of The Atchison, Topeka & Santa Fe Railway Company, designating the portions of the work to be done respectively by said city and by said railroad corporation and allocating the cost thereof between said city and said railroad corporation.	Application No. 29396

ORDER STAYING THE OPERATIVE EFFECT AND EFFECTIVE DATE OF DECISION

The Atchison, Topeka and Santa Fe Railway Company having filed its petition for review with the Supreme Court of the State of California respecting Decision No. 47344, rendered by the Commission herein on June 24, 1952, and good cause appearing therefor,

It is ordered that the operative effect of said Decision No. 47344 and the effective date thereof are hereby stayed pending the determination of said review proceeding and until the further order of the Commission.

Dated, San Francisco, California, this 26th day of August, 1952.

Justus F. Craemer, Harold P. Huls, Kenneth Potter, Peter E. Mitchell, Commissioners.

Certified as a True Copy, Secretary, Public Utilities Commission of the State of California.

[fol. 157-158] APPENDIX "D" TO ANSWER.

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of THE CITY OF LOS ANGELES, a municipal corporation, for an order or orders authorizing and requiring the widening, increasing the vertical clearance and improving of the crossings of Washington Boulevard and the Harbor Branch Line and the Main Line railroads of THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, designating the portions of the work to be done respectively by said City and by said railroad corporation and allocating the cost thereof between said city and said railroad corporation.	Application No. 29396

ORDER GRANTING REHEARING

The City of Los Angeles and The Atchison, Topeka and Santa Fe Railway Company having petitioned for rehearing in respect to Decision No. 43374 in the above proceeding, the Commission having considered each of the allegations therein, it appearing to the satisfaction of the Commission that said petitions should be granted for the purpose of reconsidering the apportionment of costs between said petitioners of the proposed grade separations, and good cause appearing,

It is hereby ordered that rehearing is hereby granted.

Said rehearing is set before Commissioner Huls, or such Examiner as may hereafter be designated to take

evidence in his behalf, at 10:00 o'clock a.m., on Thursday, the 7th day of December, 1950, in the Courtroom, Mirror Building, 145 So. Spring Street, Los Angeles, Calif.

The Secretary is directed to cause copies of this order to be served upon all appearances at least ten (10) days prior to the date set for said rehearing.

Dated, San Francisco, California, this 28th day of March, 1950.

R. E. Mittelstaedt, Justus F. Craemer, Ira H. Rowell, Harold P. Huls, Commissioners.

Commissioner Kenneth Potter, being necessarily absent, did not participate in the disposition of this proceeding.

[fol. 159-160] APPENDIX "E" TO ANSWER.

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of THE CITY OF LOS ANGELES, a municipal corporation, for an order or orders authorizing and requiring the widening, increasing the vertical clearance and improving of the crossings of Washington Boulevard and the Harbor Branch Line and the Main Line railroads of The Atchison, Topeka and Santa Fe Railway Company, designating the portions of the work to be done respectively by said city and by said railroad corporation and allocating the cost thereof between said city and said railroad corporation.	Application No. 29396

ORDER EXTENDING TIME

A written request having been filed by the City of Los Angeles, and concurred in by The Atchison, Topeka and Santa Fe Railway Company, and good cause appearing,

It is hereby ordered that the effective date of the Order

in Decision No. 43374, dated October 4, 1949, shall be extended to sixty (60) days after the date thereof.

Dated at Los Angeles, California, this 11th day of October, 1949.

R. E. Mittelstaedt, Justus F. Craemer, Harold P. Huls, Kenneth Potter, Commissioners.

Certified as a true Copy, Asst. Secretary, Public Utilities Commission, State of California.

[fol. 161] APPENDIX "F" TO ANSWER.

DECISION No. 43374, APPLICATION No. 29396

(October 4, 1949)

City of Los Angeles authorized to widen and increase the height of the existing underpass of Washington Boulevard and the Harbor Branch and main lines of The Atchison, Topeka and Santa Fe Railway Company, with the latter contributing $95,160 to the cost of said project.

Crossings—Division of Costs. The matter of direct financial benefits is not the sole test in apportioning costs between a railroad and the public. Also must be considered the continuing obligation of a railroad to participate in the constructing, maintaining and improvement of crossings over its tracks, both at grade and at separated grades.

Roger Arnebergh, Assistant City Attorney, for City of Los Angeles; *R. W. Walker* and *Wm. F. Brooks*, for The Atchison, Topeka and Santa Fe Railway Company, protestant.

OPINION

The petition of the City of Los Angeles, applicant herein, concerns the proposed widening and increasing of the vertical clearance of two grade separation crossings of Washington Boulevard and the Harbor Branch line (1) and the

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(1) This crossing is designated as Crossing No. 2H-O.1-B, and the legal description is as follows:

That portion of the right of way, 66 feet wide, of The Atchison, Topeka and Santa Fe Railway Company (formerly of the California Central Railway Company), de-

main line (2) railroads of The Atchison, Topeka and Santa Fe Railway Company. The petition alleges that the present grade separations are inadequate to meet the present demands of vehicular traffic in that they are too narrow and the vertical clearances are too low. Applicant requests that this Commission issue its order authorizing and requiring the proposed improvements, and also designating the work to be done and the costs to be apportioned to each of the parties hereto.

Protestant, The Atchison, Topeka and Santa Fe Railway Company, in its answer to the above-mentioned petition, denies, upon information and belief, any need for changing the existing grade separation crossings, and further alleges that the present crossings are wholly sufficient for the needs of the railroad and the convenience and necessity of the public using the railroad facilities. Respondent contends that, since it will receive no benefit from the proposed changes, and since any alleged need for these changes has been occasioned, not by the railroad activities, but by automotive traffic using the highway, it should not be required to bear any of the costs of changes that might be made.

Public hearing was held in Los Angeles, California, on December 6, 1948, before Examiner Syphers, at which time evidence was adduced and the matter submitted, the parties being granted permission to file written briefs. Applicant has filed opening and closing briefs, and protestant has filed a reply brief. The matter is now ready for decision.

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scribed in Deed recorded in Book 491, page 106, of Deeds, Records of said County, included within the lines of Washington Boulevard, 90 feet wide, at Harriett Street.

(2) This crossing is designated as Crossing No. 2-143.2-B, and the legal description is as follows:

That portion of the right of way, 100 feet wide, of The Atchison, Topeka and Santa Fe Railway Company (formerly of the California Central Railway Company), described in Judgment of Condemnation had in Case No. 6855 of the Superior Court of the State of California in and for the County of Los Angeles, a copy of which judgment is recorded in Book 361, page 77, of Deeds, Records of said County, included within the lines of Washington Boulevard, 90 feet wide, at Harriett Street.

[fol. 162] Washington Boulevard is a public street extending from the westerly boundary of the city at the Pacific Ocean, in the Venice area, easterly through the entire breadth of the city and for a distance of several miles east of the easterly boundary of the city (3). In the vicinity of the grade separation crossings here under consideration, Washington Boulevard traverses one of the principal industrial districts of the Los Angeles area. Throughout most of its length, Washington Boulevard has a paved surface at least 60 feet in width, with some exceptions where the pavement width varies from 40 to 60 feet. However, at the site of the two crossings here under consideration, the pavement narrows down to 20 feet in width while the street easement at these points is 90 feet. The vertical clearance of these grade separations is between 13 and 14 feet.

Witnesses for applicant testified as to the need for enlarging these two grade separation crossings. Due to the rapid increase in population in Los Angeles City and also in the county, the automobile traffic has greatly increased. This has caused a congested condition at the site of the two crossings in question inasmuch as the underpasses are too narrow and too low to permit a free flow of traffic. It is very difficult for trucks to pass each other in the underpasses, and some of the larger vehicles cannot safely go under the underpasses because of their height. All of these factors, in addition to causing congestion at the site of the underpasses, also cause a diversion of traffic. Vehicles turn to other streets, and studies (4) made by the principal traffic engineer of the City of Los Angeles show heavy turning movements at intersections in the vicinity of the underpasses. These heavy turning movements create safety hazards at the intersections where they are made.

Exhibits 3 to 7 inclusive are photographs of the two underpasses and corroborate the description of the conditions there existing as given by various witnesses.

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(3) Exhibit 8 is a map of Washington Boulevard.

(4) Exhibit 2 shows the results of a traffic check made by the City of Los Angeles as to the hourly volume of vehicles and the right and left turns at intersections in the vicinity of the two underpasses.

Some of applicant's witnesses testified that there was a need for public bus transportation along Washington Boulevard in the vicinity of the underpasses but that the inadequacy of these underpasses has deterred the institution of such bus service. Other testimony was to the effect that it is becoming increasingly important to have through highways in Los Angeles. Washington Boulevard, for the greater part of its length, is a through highway and the widening of the underpasses in question would make it a through highway for its entire length. Furthermore, Washington Boulevard is one of the streets which has a bridge crossing the Los Angeles River.

[fol. 183] The two grade separation crossings here under consideration were constructed in 1914 pursuant to an agreement between the City of Los Angeles and The Atchison, Topeka and Santa Fe Railway Company. The costs were borne one-half by the city and one-half by the railroad. In 1926 an additional superstructure for another track was installed and the entire cost of this was paid for by the railroad.

Three proposals are advanced by the applicant. One is to fill in the present separation and have the crossings at grade. The second is to use the present grade separations for east-bound traffic and build a new west-bound roadway at grade. The third is to widen and increase the height of the existing underpasses and maintain the grade separation. The last of these proposals is the one most strongly advocated. Also, the testimony shows that a grade separation is the most desirable type of crossing for this situation, in that the volume of traffic is too heavy to satisfactorily and safely be handled over a grade crossing.

The total cost of widening the present underpasses and constructing new bridges is estimated to be $722,100, (5) and exhibits were introduced at the hearing showing the details of this contemplated improvement. (6) A break-

(5) Exhibit 12.

(6) Exhibits 9, 10, 11, and 13.

down of the estimated costs was given by an engineer who testified for applicant, as follows:

Two span-deck girder railway bridges,		
One west of Harriet Street	$192,000	
One east of Harriet Street	204,000	$396,000
Structure wing walls, and walls between structures		79,800
Storm drain, sewer		240,550
Slope rights		5,750
Total		$722,100

An analysis of all of the evidence presented herein shows that there is practically no dispute as to the factual situation. The testimony and exhibits showing the desirability and need of widening the existing underpasses and providing more vertical clearance were not seriously challenged nor controverted. Likewise, the estimated cost of the proposed improvements was not challenged. The issue in the matter, therefore, resolves itself into a legal inquiry. What portion of the costs, if any, shall be borne by the railroad? In considering this question we have had the benefit of applicant's opening and closing briefs and protestant's reply brief.

The City of Los Angeles contends that the railroad should bear that portion of the costs which the existence of the railroad tracks adds to the cost of the proposed improvement. Under this contention it is argued that the City of Los Angeles should pay only that cost of widening the street which it would pay if there were no railroad crossing; [fol. 164] all other costs, such as the cost of the bridge and its supports, should be borne by the railroad. The public, it is contended, should not be required to pay additional costs for street improvements when these additional costs are occasioned by the presence of the railroad.

The protestant railroad takes the position that costs should be allocated according to benefits received. It contends that the railroad will receive no benefits from the proposed widening since it is now operating satisfactorily and the widening of the street will in no way change these

operations. As a matter of fact, the railroad contends the proposed improvements will actually be a detriment since there will be increased costs involved in maintaining the longer bridge. It contends that the need for widening the underpasses has arisen, not because of any activity of the railroad, but because of the increase in motor vehicle and pedestrian traffic.

In 1932 these same parties were before this Commission in a similar proceeding involving the same two crossings. (7) At that time the proposal of the City of Los Angeles was to widen the two grade separations so that the roadway under them would have a width of 56 feet. This Commission issued its order authorizing widening of the grade separations and holding that the costs should be borne "25 per cent by The Atchison, Topeka and Santa Fe Railway Company and 75 per cent by applicant." The order further provided that the authorization therein granted should lapse and become void if not exercised within one year from the date thereof. The authorization was not exercised and, therefore, lapsed according to its terms.

As pointed out by applicant in its closing brief, we cannot now fail to take note of the material change in conditions at the present time as compared to those in 1932, at the time of Decision No. 25069, supra. The great increase in population and the tremendous increase in motor vehicle traffic present a new problem.

According to the evidence presented, the widening of the underpass is now necessitated by the increase in vehicular and pedestrian traffic. The area in the vicinity of the two underpasses here under consideration has become one of the leading industrial areas of Los Angeles and its environs. As a result, there is a large amount of motor truck traffic hauling to and from these areas. The reasons advanced by applicant for widening the underpasses, which reasons were not disputed by protestant, were the increase in motor vehicle traffic, both passenger and commercial, the need to make Washington Boulevard a through street for its entire length, the need for a bus line to transport passengers

(7) Decision No. 25069, dated 8/15/32, in Application No. 18063, 37 CRC 784.

through that area, and the inadequate height of the present underpass. It was pointed out that the height of the underpass should be increased so as to provide adequate clear-
[fol. 165] ance for commercial vehicles. All of these factors have resulted in a congestion of traffic in the area of the underpasses, and the diversion of traffic to other streets, which diversion is felt even in the central business district of Los Angeles.

The protestant railway company contends that none of these factors are due to the operation of the railroad; that the railway operations are being conducted satisfactorily over the present underpasses. A fair view of all of the evidence presented in this matter supports this contention. Thus we are specifically faced with the problem of who shall pay the cost of widening of the underpass where the necessity for such widening is not due to the activities of the railroad but rather to the needs of the automotive and pedestrian traffic.

The applicant city relies rather strongly on the proposition that the proposed improvement is an exercise of the police power and that, therefore, it is distinguishable from similar situations involving federal aid highways. Exhibit No. 20, introduced in evidence, is a copy of General Administrative Memorandum 325 of the Public Roads Administration, Federal Works Agency, of the United States Government. This particular memorandum sets out the policy of the federal agency to be that the costs assessed against the railroad in such situations shall be based upon the benefits accruing to the railroad and, in no case, shall costs be greater than 10% of the total cost of the project. In the case of reconstruction of existing rail-highway grade separation structures, the memorandum states that such reconstruction "shall be considered as not resulting in ascertainable benefits to the railroad and, consequently, no contribution to the cost of such a project by the railroad shall be required."

We find that the situation presented in the matter before us is differentiable from those grade crossing and grade separation situations involving federal aid highways, since Washington Boulevard is a city street and no federal funds are to be used in the proposed widening.

Applicant city, in its brief, set out at some length the authority of this Commission to require grade separations and allocate the costs thereof. These contentions are not challenged and there is no question as to the jurisdiction and power of this Commission in this matter to allocate costs within legal and constitutional limitations. However, in considering these costs, a sound policy requires that the allocations be reasonable and equitable. We must take cognizance of present-day conditions, and in this particular instance we are impressed not only by the fact that the need for the proposed improvements is not brought about by any requirement of the railroad, but also by the fact that, but for the existence of the railroad at the location of the proposed street widening and the grade separation structures now there, the city would be able to widen its [fol. 166] street without the necessity of incurring the cost of replacing the existing bridge and underpass structures with the new structures proposed.

If the contention of the City of Los Angeles were to be sustained, then the railroad would be required to pay $475,300, that amount being the cost of the two proposed bridges and the structure wing walls and walls between the structures. The City of Los Angeles would be required to pay $246,300, that being the cost of the proposed improvements other than that cost necessitated by the existence of the railroad. We do not subscribe to this contention. Within its proper limitations, the police power of the City of Los Angeles is not challenged. However, we must also consider the fact that protestant railway has already paid its proportionate share of the existing structures.

The pavement under the existing underpasses is 20 feet in width and the proposal is to widen this so as to permit a 90-foot roadway thereunder, but, an analysis of other evidence presented in this record shows that the widening of these underpasses to 90 feet will not increase the traffic capacity of the street to that extent. The Washington Boulevard bridge over the Los Angeles River is only 56 feet in width and is located east of the underpasses and west of Soto Street, with no cross streets between the underpasses and this bridge. Accordingly, it is obvious that the

practical carrying capacity of the street beyond the underpasses would be limited to 56 feet.

In view of this situation, and in view of the evidence which indicates that the principal need for widening the underpasses is occasioned by traffic conditions on Washington Boulevard, we conclude that the proposed additional width of the underpasses, over and above 56 feet, becomes a matter of future city planning and will not contribute to the immediate traffic problem.

The Commission in *City of Los Angeles* Application No. 19063, Decision No. 25069, 37 CRC 784, at 796-7 said: "The matter of direct financial benefits is not the sole test in the determination of the respective portions which the railroad and public should contribute toward the cost of such improvement. In apportioning the cost of constructing these separations between applicant and the railroad company, due consideration should be given to the obligations of each party, as well as to the benefits derived. It should be recognized that the railroad has a continual obligation to participate in the matter of constructing and maintaining reasonable and adequate crossings over its tracks both at grade and at separated grades. This obligation is inherent, notwithstanding the fact that the traffic on the railroad may increase or decrease."

We believe that the railroad has a continuing obligation to participate in the cost of such an improvement as is contemplated. Therefore, in considering any allocation of [fol. 167] costs, the extent of the additional cost for bridge structures for the widening of the street over and above a 56-foot width should be allocated to the city.

As previously has been pointed out, the total cost of the proposed improvement will be $722,100, but the cost attributable to the presence of the railroad is $475,800. The remainder of the cost is clearly attributable to the paving and widening of the street. Of the proposed 90 feet of roadway, 20 feet is now available under the existing underpasses and the excess over 56 feet, or 34 feet, is attributable to future city planning. Therefore, this leaves but 36 feet of the proposed railway bridges, the costs of which are in any way attributable to the existence of the railway. These costs would amount to 40% of $475,800, or $190,320.

We conclude that this last-named amount is the only cost which should be allocated in this proceeding. In allocating this amount of $130,320 between the applicant city and the protestant railroad, we give effect to the factual situation as presented by the evidence in this case. A fair view of this evidence warrants the conclusion that each of the parties should defray one-half of this amount.

After considering all the evidence presented in this matter, we hereby find that public convenience and necessity have been shown to justify the widening of the existing grade separations, and we further find that there is a duty upon the protestant railway to defray a portion of the costs of such widening, as set out hereinabove.

ORDER

Application as above entitled having been filed, a public hearing having been held and the Commission being fully advised in the premises,

It is ordered that the City of Los Angeles be, and it hereby is, authorized to widen and increase the height of the existing underpasses of Washington Boulevard and the Harbor Branch line and the main line railroads of The Atchison, Topeka and Santa Fe Railway Company in the manner and at the locations more particularly described in the foregoing opinion and substantially in accordance with the plan introduced in evidence in this proceeding, subject to the following conditions:

1. The expense of constructing said undergrade crossings shall be borne by the City of Los Angeles with exception of the sum of $95,100, which amount shall be borne by The Atchison, Topeka and Santa Fe Railway Company.

2. In the event applicant elects to construct said undergrade crossings, the cost of maintaining those portions of the separations which, for the purpose of this decision, shall be referred to as the superstructures, which shall be deemed to be everything above the bridge seats, shall be borne by The Atchison, Topeka and Santa Fe Railway Company. The re-

mainder of the maintenance of said structures shall be borne by applicant.

[fol. 168-174] 3. Prior to the commencement of construction, applicant shall file with this Commission for approval a set of plans for the proposed grade separation crossings which plans shall have been approved by The Atchison, Topeka and Santa Fe Railway Company, or bear a statement as to why the said railway company refuses to approve such plans. In the event the said railway company refuses to approve such plans, this Commission may issue supplementary orders in this matter.

4. The crossing shall be constructed with clearances conforming to the provisions of General Order 26D of this Commission.

5. Applicant within thirty (30) days thereafter shall notify this Commission, in writing, of the completion of the installation of said crossings and of its compliance with the conditions hereof.

6. The authorization herein granted shall lapse and become void if not exercised within one year after the date hereof unless further time is granted by subsequent order.

The effective date of this order shall be twenty (20) days after the date hereof.

Dated at San Francisco, California, this 4th day of October, 1949.

Mittelstaedt, Craemer, Rowell, Huls, Potter, Commissioners.

[fol. 175] (File Endorsement Omitted)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

(Title omitted)

ANSWER AND BRIEF OF THE CITY OF LOS ANGELES, A RESPONDENT AND REAL PARTY IN INTEREST, IN OPPOSITION TO ISSUANCE OF WRIT OF REVIEW—Filed August 12, 1952.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the State of California:

Pursuant to Rule 58(b) of the Rules on Appeal, the City of Los Angeles, real party in interest in the above-entitled matter, hereby files this its answer and brief in opposition to the issuance of writ of review in this cause.

[fol. 176] ANSWER

The City of Los Angeles, a municipal corporation, a respondent and real party in interest, answering petitioner's Petition for Writ of Review, ADMITS, DENIES AND ALLEGES as follows:

I.

Answering paragraph III, this respondent alleges that, in the 1932 proceeding, the Public Utilities Commission, by its Decision No. 25069, provided, in part, that "The entire expense of constructing said undergrade crossings, on the basis of a roadway width of fifty-six feet, shall be borne twenty-five per cent by The Atchison, Topeka & Santa Fe Railway Company and seventy-five per cent by applicant (City of Los Angeles)"; that, in its Decision No. 47344, the Commission provided that "Fifty per cent (50%) of the costs of the proposed structures attributable to the presence of the railroad tracks, as defined in the foregoing opinion, excluding the costs attributable to the paving and widening of the street, shall be borne by The Atchison, Topeka & Santa Fe Railway Company, and the remainder of the costs shall be borne by the City of Los Angeles"; that the cost to the City of Los Angeles to make the necessary improvement of Washington Boulevard, if the railroad were not present, would be $111,750; that the addi-

tional cost due to and resulting from the presence of the railroad is $701,015; that the total cost of the project is $812,765; that the Commission, in allocating costs, found that only the amount of $569,355 should be allocated, mak- [fol. 177] ing the share allocated to the Santa Fe $284,677.50; that had exactly the same method of allocation been adopted by the Commission in its Decision No. 47344 as was used in the 1932 decision the amount allocated to the Santa Fe would have been $203,191.25; that since 1932 the American Railway Engineers Association Official Specifications for Steel Railway Bridges increased from a Cooper's "Live Loading" of E-60 to an E-72, and therefore both of the existing structures are now substandard according to such standards; that the existing structures were approximately 20% depreciated in 1932, whereas they are now approximately 75% depreciated.

II.

Answering paragraph IV, this respondent alleges that Washington Boulevard is a city street, handling local traffic.

III.

Answering paragraph V, this respondent denies that the Commission unlawfully, arbitrarily, or unreasonably exceeded its authority, or its jurisdiction, or deprived Santa Fe of its constitutional rights, or any other rights, to due process or equal protection of the laws, or of its property without just compensation, or placed an undue burden on interstate commerce; and further denies that the Commission in any manner or in any way acted in violation of the Constitution of the United States of America, or any amendment thereto, or in violation of the Constitution of the State of California, or any section thereof, in any particular whatsoever, or at all.

[fol. 178] Furthering answering said paragraph, this respondent alleges that in all particulars and at all times the Commission acted pursuant to and in accordance with its powers and duties, and pursuant to and in accordance with applicable provisions of law.

Further answering said paragraph, which contains conclusions of law, argument, opinion, and assumptions of

ultimate facts, this respondent incorporates by reference the matters set forth in its brief.

Wherefore, this respondent respectfully prays:

1. That no writ of review be issued by this Honorable Court in this proceeding.
2. For its costs herein.
3. For such other and further relief as may be proper and just in the premises.

Ray L. Chesebro, City Attorney, Bourke Jones, Assistant City Attorney, Roger Arnebergh, Assistant City Attorney, Attorneys for the City of Los Angeles, a Respondent and Real Party in Interest.

[fol. 179]. Brief in Opposition to Issuance of Writ of Review

Statement of Case

On June 4, 1948, the City of Los Angeles filed an application, numbered 29396, with the Public Utilities Commission of the State of California for an order authorizing and requiring the widening, increasing the vertical clearance and improving of the crossings of Washington Boulevard and the Harbor Branch Line and the Main Line railroads of The Atchison, Topeka & Santa Fe Railway Company, designating the portions of the work to be done respectively by said City and by said railroad company and allocating the cost thereof between said City and said railroad company.

After public hearing the Commission, under date of October 4, 1949, issued its Decision No. 43374, authorizing [fol. 179-1] the widening of the underpasses and allocating the expenses thereof between the City and the Railroad. The Commission held that, of the estimated total cost of $722,100, only $190,320 was in any way attributable to the existence of the railway. The Commission, giving effect to the factual situation, determined that the Santa Fe and the City should each pay one-half of the amount which the Commission had there determined to be the cost which was in any way attributable to the existence of the railway.

On November 22, 1949, the City filed a petition for rehearing based on the following grounds:

a. The decision was contrary to the law and the facts in that it assumed the City to be the principal beneficiary from the grade separations, and it disregarded the legal right of the City of Los Angeles to require the protestant, The Atchison, Topeka and Santa Fe Railway Company, to remove its tracks from city streets, at its own cost and expense, as established by the cases cited in applicant's brief theretofore filed in the proceeding.

b. The formula adopted (requiring each party to pay one-half of the allocable costs) was prejudicial to the City, would require the City to expend its funds for the benefit of the Santa Fe, and would unconstitutionally deprive the City of its property.

c. The failure of the Commission to order the Santa Fe to pay the full cost of that portion of the proposed improvement which is attributable to the presence of the railway tracks would result in unconstitutionally depriving the City of its property.

[fol. 179-2] d. That even if the formula requiring the Santa Fe and the City to each pay one-half of the cost of that portion of the proposed improvement which is attributable to the presence of the railroad tracks was proper, the formula was improperly and incorrectly applied and such application of the formula was contrary to and in conflict with the uncontroverted facts.

Thereafter, on December 2, 1949, the railroad filed a petition for rehearing, alleging that the costs should be assessed on a so-called "benefits" basis, and that to require it to pay one-half of the costs attributable to the existence of the railroad at the crossing was erroneous and contrary to the law.

The Commission, under date of March 28, 1950, issued its order granting a rehearing.

At the rehearing a stipulation was entered into to the effect that all evidence in the prior hearing be incorporated in the record on the rehearing. In addition, extensive additional evidence was produced by both parties.

Thereafter, the Commission, under date of June 24, 1952, issued its Decision No. 47344. In this decision the Commission referred to evidence showing that the estimate of the total cost of the proposed project had increased from $722,100, the estimate at the time of the original hearing, to $812,765, and that the cost to the City, if the railroad were not present, would be $111,750. The Commission, in its decision, likewise referred to other material evidence.

In its Decision No. 47344 the Commission determined that the estimated costs of the proposed structures which [fol. 179-3] may be said to be attributable to the presence of the railroad tracks for two divided span bridges (the recommended type of construction) was $569,355. Certain costs, such as for slope rights and storm drain, as well as costs for street work, etc., were held not to be properly allocable and were assigned in their entirety to the City.

The breakdown of the $569,355, found by the Commission to be allocable, is as follows:

Bridge aA-1	$234,000	
Bridge aA-144	246,200	
		$480,200
Retaining and wing walls		89,155
		$569,355

In neither the original decision nor in the decision on rehearing did the Commission order the railroad to pay 50 per cent of the cost of the proposed projects; in both decisions the Commission did order the railroad to pay 50 per cent of the costs which the Commission found to be properly allocable. The difference in the amounts which the railroad was ordered to pay under the first decision and under the decision on rehearing is due in part to increased estimates of total cost, and due in part to the Commission's including the full cost of the actual bridge structures as allocable costs. In the first decision only a part of the cost of the actual bridge structures was allocated.

Throughout the proceedings, the City of Los Angeles has contended that the Railroad should be required to pay that portion of the total cost which is attributable to the presence of the railroad tracks; that the proper basis of apportionment of the total costs is to assign to the Railroad the amount by which the presence of the railroad increases the cost of the necessary street improvement; and that the cost to the City of maintaining and improving its city streets should not be increased by reason of the presence of railroads running upon or across them.

The Railroad has contended that costs should be allocated according to benefits received by it; that it would receive no benefit from the proposed improvement; and that it should therefore pay no portion of the cost.

Evidence

The evidence as summarized by petitioner in its brief is quite comprehensive; however, certain additional evidence should be noted, and other evidence emphasized.

(a) Evidence Introduced at Original Hearing.

At the present time there are no facilities at all for pedestrian traffic (Tr. 35.)

If no proper allocation of costs of widening existing underpasses is made, then the City can build crossings at grade (Tr. 36) and trains would have to obey traffic signals. (Tr. 37.)

The City of Los Angeles has a right of way or easement for street purposes at the site of the grade separations, [fol. 179-5] which was acquired by negotiation and condemnation (Tr. 45), such right of way being 90 feet in width (Tr. 49).

The cost of widening the roadway by elimination of the existing underpasses and making the crossing at grade would be $345,000. (Tr. 54.)

To accomplish the necessary widening of Washington Boulevard by a grade crossing would mean delay to both vehicular and rail traffic, and would be an added accident hazard. (Tr. 58.)

That while the plan to widen the underpasses had its inception with the City of Los Angeles, the Santa Fe sug-

quoted that if the widening of the underpasses be accomplished, it should be accomplished by the use of bridges such as provided for by the Commission decision. (Tr. 78.)

That in 1910 Los Angeles had a population of 102,000 (the underpasses were first constructed in 1914); in 1920 the City had a population of 576,000; in 1940 it had a population of 1,987,000. In 1910 the County of Los Angeles had a population of 504,000; in 1943 it had a population of over 4,000,000. (Tr. 82-83.)

In 1942, within a five-mile radius of the crossings here involved, there were more than 1,150,000 people, and within a ten-mile radius there were more than 2,500,000 people. (Tr. 84.)

(b) Additional Evidence Introduced on Rehearing.

In addition to the evidence introduced at the original hearing, which by stipulation was deemed introduced at the rehearing, the following is in evidence:

Unlike a freeway, which only serves to carry traffic, a street such as Washington Boulevard has a tremendous [fol. 179-6] function in serving the properties fronting on the boulevard; freeways are entirely supplemental to the city street system and do not reduce the need of the existing street system which handles local traffic. (Tr. 97.)

A very small percentage of traffic on Washington Boulevard is through traffic that enters one end of Washington Boulevard and goes out the other end of Washington Boulevard (Tr. 102, 105.)

Mr. Jenkins, a company witness who testified at length as a consulting engineer, testified that in his opinion such office building and bridge presents a hazard similar to a grade crossing because people could wilfully take advantage of the height to bring about self-destruction (Tr. 319), although he later admitted that "there is no escaping the fact that railroad crossings constitute a hazard to life and property at the present time." (Tr. 322.)

He further testified that under present traffic conditions street traffic presents a hazard to trains, which was "extremely serious," and that the elimination of such hazard was an advantage to the train. (Tr. 324-5.)

He also testified that in computing "benefits" resulting from grade separations the delay factor should be given considerable weight (Tr. 331); that the Railroad receives

benefit, because of this delay factor, in the elimination of grade crossings (Tr. 332), but that the so-called Johnson formula, used for determining benefits resulting from grade crossing elimination, does not go into the delay to rail traffic at all! (Tr. 332.) He likewise testified that he gave no valuation at all to the delay factor, insofar as determining benefits to the Railroad was concerned, because he couldn't visualize a procedure whereby an existing grade separation would be improved, instead of first applying [fol. 179-7] for a grade crossing, and then applying for a grade separation. (Tr. 309-310.)

He further testified that a main line railroad couldn't operate under signalized or synchronized control of traffic, such as that under which vehicular traffic operates. (Tr. 334-337.)

In Mr. Jenkins' Exhibit R. H. 29, page A-21, it shows that for the 25 grade separations in 1931, the latest year listed, the share of the cities involved was $600,344 out of a total cost of $3,167,086, or less than 20 per cent. (Tr. 342.)

Mr. Jenkins also testified that there were heavy industries in the area here involved, and that there was local traffic from such industries using Washington Boulevard. (Tr. 412-414.)

Likewise he admitted that probably 100 per cent of all passenger traffic handled by railroads use city streets at some stage of their journey, so that city streets are feeders and used as feeders for the railroad business, and that a comparable situation largely exists with respect to freight, except that there is a larger percentage of freight served directly by spurs which do not involve truck connection. (Tr. 414-415.)

He likewise admitted that the mere presence of a truck doesn't prove competition with a railroad, but instead the truck might be feeding the railroad, rather than competing with it. (Tr. 415.)

He further admitted that a crossing at grade would be a detriment to the Railroad. (Tr. 420.)

[fol. 179-8] Mr. Jenkins' Exhibit R. H. 29 (p. 73) shows that in 19 states the allocation of costs of grade crossings is fixed by state agencies, apparently solely at the discretion of such state agencies, except that in Connecticut a rail-

road is assessed between 50 per cent and 100 per cent for projects not on a state highway system. In 18 states the allocation to railroad is fixed at not less than 50 per cent. While petitioner in its brief states that this group consists primarily of southern states, it is interesting to note that included in such group are Kansas, Maine, Oklahoma, Pennsylvania, Vermont, and Washington.

Mr. Grey, another company witness, testified that since 1900 there has been a very substantial increase in the business done by the Santa Fe, freightwise, over the lines using the tracks here involved; that where there is a series of tracks such as here involved, and assuming an automobile and train collision, there would be considerable expense and delay and disruption of scheduling, which would not be reflected in claim payments (Tr. 483); that in such accidents considerable damage is done to the Santa Fe equipment, such as when a truck collided with the Super Chief, damaging Santa Fe equipment about $150,000 and delaying the train about two hours; that a serious delay influences movement of traffic in either direction, not only at the point of the accident but further on down the line (Tr. 484); that the tonnage now handled over these tracks is up, even greater than in 1928 or 1929 when volume was very heavy (Tr. 492); that the San Diego line, which uses these tracks, is a very good passenger earner (Tr. [fol. 179-9] 494); that the diesel locomotives now being used handle longer trains with more tonnage, which is a benefit to the Railroad, and the longer the train the better for the Railroad, regardless of the fact that such longer trains would block grade crossings for a longer period of time. (Tr. 495.)

Mr. Terras, another company witness, admitted that the Cooper's Loading of the existing structures was E-56 and E-65, and that the bridges are depreciated over a period of 50 years. (Tr. 522.)

Through Mr. Crowley, Southern California Representative of the League of California Cities, Exhibit 53 R. H., was introduced in evidence, such exhibit being a copy of Resolution adopted by the League of California Cities approving a formula of allocating grade separation costs whereby the municipality would pay the amount it would cost to improve the street if there were no railroad tracks

involved, and the railroad would pay the costs occasioned by the presence of the railroad tracks.

Mr. Springer, a City witness, presented evidence (Ex. 61 R. H.) and testimony showing that in 1943 the recommended Cooper's Loading for railway bridges was increased to E-72 (Tr. 581) and that both the existing structures here involved are substantially below present standards. (Tr. 583.)

Mr. Winter, another City witness, presented Exhibit 62 R. H., which is a land use map showing the general use of property fronting on Washington Boulevard in the vicinity of these underpasses. This shows the extensive use of Washington Boulevard for local traffic, including some 450 vehicles entering or leaving the Santa Fe yards in a 24-hour period. (Tr. 591.)

[fol. 179-10] ARGUMENT.

POINT I.

The Public Utilities Commission Has the Exclusive Power and Duty to Allocate Costs of Grade Separations.

Article XII, section 22, of the California Constitution provides, in part, that:

> "No provision of this Constitution shall be construed as a limitation upon the authority of the Legislature to confer upon the Public Utilities Commission additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred upon the Public Utilities Commission in this Constitution, and the authority of the Legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this Constitution."

Article XII, section 23, provides, in part:

> "* * * The railroad commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the State of California, and to fix the rates to be charged for commodities fur-

nished, or services rendered by public utilities as shall be conferred upon it by the Legislature, and the right of the Legislature to confer powers upon the railroad commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this constitution."

Pursuant to such constitutional provisions the Legislature enacted the Public Utilities Act, now incorporated [fol. 178-11] in the Public Utilities Code. Section 1202 of the Public Utilities Code reads as follows:

"Sec. 1202. Exclusive powers of commission. The commission has the exclusive power:

"(a) To determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use, and protection of each crossing of one railroad by another railroad or street railroad, and of a street railroad by a railroad, and of each crossing of a public or publicly used road or highway by a railroad or street railroad, and of a street by a railroad or vice versa, subject to the provisions of Sections 1121 to 1127, inclusive, of the Streets and Highways Code so far as applicable.

"(b) To alter, relocate, or abolish by physical closing any such crossing heretofore or hereafter established.

"(c) To require, where in its judgment it would be practicable, a separation of grades at any such crossing heretofore or hereafter established and to prescribe the terms upon which such separation shall be made and the proportions in which the expense of the construction, alteration, relocation, or abolition of such crossings or the separation of such grades shall be divided between the railroad or street railroad corporations affected or between such corporations and the State, county, city, or other political subdivision affected."

The California Public Utilities Commission, in its Decision No. 47344, from which decision petitioner is seek-

[fol. 179-12] ing a writ of review, clearly set forth the law when it stated:

"There is no statutory requirement that this Commission follow any particular theory of allocation of costs. Under the theory advanced by the City of Los Angeles that the railroad should pay the additional costs of construction resulting from the presence of the tracks, the railroad's share would amount to about 86 per cent of the total costs. Under the theory advanced by the railroad that it should pay only according to the benefits it receives, and considering its contention that it receives no benefits, its contribution would be nothing.

"The authority of this Commission to allocate costs, as designated in Section 1202 of the Public Utilities Code, *supra*, is an exercise of the police power on the part of the State of California through the medium of its agency, the Public Utilities Commission. We hold that the law is well established that under the exercise of the police power a state may regulate the crossings of railroads with its highways, and may require grade separations to be erected and maintained, apportioning the costs in the exercise of its sound discretion. (*Erie Railroad Company v. Board of Public Utility Commissioners*, 1920, 254 U. S. 394; 65 L. Ed. 322; *Chicago, Milwaukee and Saint Paul Railway Company v. Minneapolis*, 1914, 232 U. S. 430; 58 L. ed. 671; *Missouri Pacific Railway Company v. Omaha*, 1914, 235 U. S. 121; 59 L. ed. 157; *Lehigh Valley Railroad Company v. Board of Public Utility Commissioners*, 1928, 278 U. S. 24; 73 L. ed. 161.)"

[fol. 179-13] PART II.

In the Absence of Constitutional or Valid Statutory Limitations, the State and Its Duly Authorized Political Subdivisions Have Full Power and Authority, Both at Common Law and Under the Federal Constitution, to Require Separation of Grades at Crossings of Public Streets and Highways by Railroads and to Require the Railroads to Pay as Much as the Entire Cost Thereof and to Repair and Maintain the Separation

Structures After Their Construction. This Is a Proper Exercise of Police Power by or on Behalf of the Sovereign.

In the case of *Erie Railroad Co. v. Board of Public Utility Comrs.* (1920), 254 U. S. 394, 65 L. Ed. 322, an order had been made by the Board of Public Utility Commissioners of New Jersey requiring the Erie Railroad to install grade separations at fifteen street crossings in the city of Paterson. Fourteen of these crossings were required to be made by means of underpassed streets and the fifteenth by means of a viaduct carrying the street over the railroad. The order required the railroad company to pay the *entire* cost of *all* of these separations, with the exception that 10% of the cost was required to be borne by a streetcar company which occupied three of the crossings. Most of the streets involved were laid out later than the railroad tracks. The railroad company insisted that compliance with the order would result in its bankruptcy and attacked the order on the grounds that it was unreasonable, arbitrary and a violation of the due process and interstate commerce clauses [fol. 179-14] of the federal constitution. In affirming the order the Supreme Court of the United States, speaking through Mr. Justice Holmes (254 U. S. 410, 65 L. Ed. 333), said:

> "Grade crossings call for a necessary adjustment of two conflicting interests,—that of the public using the streets, and that of the railroads and the public using them. Generically the streets represent the more important interest of the two. There can be no doubt that they did when these railroads were laid out, or that the advent of automobiles has given them an additional claim to consideration. They always are the necessity of the whole public, which the railroads, vital as they are, hardly can be called to the same extent. Being places to which the public is invited, and that it necessarily frequents, the state, in the care of which this interest is, and from which, ultimately, the railroads derive their right to occupy the land, has a constitutional right to insist that they shall not be made dangerous to the public, whatever may be the cost to the parties introducing the danger. That

is one of the most obvious cases of the police power; or, to put the same proposition in another form, the authority of the railroads to project their moving masses across thoroughfares must be taken to be subject to the implied limitation that it may be cut down wherever and so far as the safety of the public requires. It is said that if the same requirement were made for the other grade crossings of the road, it would soon be bankrupt. That the states might be so foolish as to kill a goose that lays golden eggs for them has no bearing on their constitutional rights. If it reasonably can be said that safety requires the change, it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil. (Citing [fol. 179-15] cases.) To engage in interstate commerce the railroad must get on to the land; and, to get on to it, must comply with the conditions imposed by the state for the safety of its citizens. Contracts made by the road are made subject to the possible exercise of the sovereign right. (Citing cases.) If the burdens imposed are so great that the road cannot be run at a profit, it can stop, whatever the misfortunes the stopping may produce. (Citing cases.) Intelligent self-interest should lead to a careful consideration of what the road is able to do without ruin, but this is not a constitutional duty. In the opinion of the courts below the evidence justified the conclusion of the board that the expense would not be ruinous."

In *Cincinnati, I. & W. R. Co. v. Connersville* (1919), 218 U. S. 336, 54 L. Ed. 1064, the railroad maintained an embankment across Grand Avenue in the city of Connersville, Indiana, and thereby blocked passage between the northerly and southerly parts of the street. The city council adopted a resolution that said avenue should, as a matter of public necessity, be opened as a public street through the railroad embankment and proceeded to condemn a street easement through the embankment for the full width of the avenue. At a trial by jury compensation was awarded to the railroad only for the land thus condemned. The trial court

instructed the jury that it was the duty of the defendant railroad company to construct and keep in safe condition all highway crossings and that the railroad would not be entitled to any damages for constructing the necessary crossing or abutments and bridge for supporting its railroad over and across the street when constructed. The trial court refused to instruct the jury that in considering the railroad's damages it should take into account the cost to the railroad of constructing a bridge to carry its rail-[fol. 179-16] road over the proposed street. No award was made for the cost of such bridge, etc. Thus the city bore the expense of the construction of the street and the railroad was required to install the necessary bridge to carry its tracks. The judgment was affirmed by the Supreme Court of Indiana and upon appeal to the Supreme Court of the United States was again affirmed. On such appeals the railroad company contended that the police power of the state cannot be so applied as to require the railroad company to build the bridge without compensation. In affirming the judgment, the Supreme Court of the United States, speaking through Mr. Justice Harlan, said (218 U. S. 242, 54 L. Ed. 1064):

"If the railway company was not entitled to compensation on account of the construction of this bridge, —whether regard be had to the 5th or the 14th Amendments of the Constitution, or to the general reserved police power of the state,—then it is clear that the jury were not misdirected as to what should be considered by them in estimating the damages which, under the law, the railway company was entitled to recover.

"The question as to the right of the railway company to be reimbursed for any moneys necessarily expended in constructing the bridge in question is, we think, concluded by former decisions of this court; particularly by *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 582, 584, 591, 50 L. ed. 301, 305, 306, 308, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175; *New Orleans Gaslight Co. v. Drainage Comrs.*, 197 U. S. 453, 49 L. ed. 831, 25 Sup. Ct. Rep. 471; *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 571,

38 L. ed. 935, 274, 14 Sup. Ct. Rep. 827; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 254, [fol. 170-17] 41 L. ed. 979, 990, 17 Sup. Ct. Rep. 581; *Northern Trust Co. v. Chicago*, 99 U. S. 635, 25 L. ed. 336. See also *Union Bridge Co. v. United States*, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367. The railway company accepted its franchise from the state, subject necessarily to the condition that it would conform at its own expense to any regulations, not arbitrary in their character, as to the opening or use of streets, which had for their object the safety of the public, or the promotion of the public convenience, and which might, from time to time, be established by the municipality, when proceeding under legislative authority, within whose limits the company's business was conducted. This court has said that 'the power, whether called police, governmental, or legislative, exists in each state, by appropriate enactments not forbidden by its own Constitution or by the Constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good.' *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 297, 43 L. ed. 702, 706, 19 Sup. Ct. Rep. 465, 470."

In *Chicago, M. & St. P. R. Co. v. Minneapolis* (1914), 232 U. S. 430, 58 L. Ed. 671, the city of Minneapolis had acquired certain property for park purposes which included two lakes in their entirety and a portion of the shores of a third lake, together with large tracts of land in the vicinity. It proceeded to construct two canals connecting the three lakes, together with walks on either side thereof. The railroad owned a right of way 100 feet wide which crossed the path of one of the proposed canals and the city sought to condemn an easement for this canal [fol. 170-18] and its lateral walks across this right of way. The railway tracks at the point in question were located on an artificial embankment 18 feet above the water level of the lakes. It was agreed that the city should take the land and construct the canal and walks and that the railway company should build the bridge according to plans

prepared by the city, but the railway company reserved its right to recover damages or compensation in the condemnation action and claimed, in addition to the value of the land taken (which was paid), that it should be compensated for the entire cost of the necessary bridge across the canal and such further sum as would be sufficient to maintain the bridge. The judgment in the condemnation case awarded to the railroad only the value of the land taken together with the cost of certain features of the bridge which were purely ornamental. In affirming the judgment the Supreme Court of the United States, speaking through Mr. Justice Hughes, said (232 U. S. 437, 58 L. Ed. 674):

> "The question thus presented is whether the refusal to allow compensation for the cost of constructing and maintaining the necessary railroad bridge across the gap in the right of way, made by the building of the canal, amounts to a deprivation of property without due process of law.
>
> "*It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings, but also to build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their tracks, or to carry their tracks over such highways. . . .*" (Emphasis ours.)

[fol. 179-19] Quoting from a Minnesota case the court proceeds:

> "'A railroad company receives its charter and franchise subject to the implied right of the state to establish and open such streets and highways over and across its right of way as public convenience and necessity may, from time to time, require. That right on the part of the state attaches by implication of law to the franchise of the railroad company, and imposes upon it an obligation to construct and maintain at its own expense suitable crossings at new streets and highways to the same extent as required by the rules of the common law at streets and high-

ways in existence when the railroad was constructed.' . . . (Citing cases.)

"Under the doctrine of these decisions, it necessarily follows that if the city of Minneapolis had opened a public road through the embankment of the plaintiff in error, the latter would have had no ground to complain that its constitutional rights had been violated because it was compelled to bridge the gap at its own cost. No different rule could be applied because the highway was laid out in order to increase the advantages of a public park. In this aspect, it would be equally a crossing devoted to the public use (citing cases); and we see no basis for a distinction in principle in the case of an intersecting public road opened under competent authority because such a highway might lead to public recreation grounds instead of to places of business, or might connect lakes instead of avenues."

In *Missouri Pacific R. Co. v. Omaha* (1914), 235 U. S. 121, 59 L. Ed. 157, the city of Omaha by ordinance required the railroad to construct a viaduct over its line at its intersection with Dodge Street, together with ap- [fol. 179-20] proaches thereto along the southerly line of Dodge Street, leaving the northerly side of the street open to public traffic. The ordinance required construction of the viaduct in accordance with plans and specifications prepared by the city engineer. The railroad brought this action in the federal courts. The Circuit Court (which was then the federal court of original jurisdiction) dismissed the bill and this decree was affirmed both by the Circuit Court of Appeals and the Supreme Court of the United States. The latter court, speaking through Mr. Justice Day, said (235 U. S. 127, 59 L. Ed. 160):

"That a railway company may be required by the state, or by a duly authorized municipality acting under its authority, to construct overhead crossings or viaducts at its own expense, and that the consequent cost to the company as a matter of law is *damnum absque injuria*, or deemed to be compensated by the public benefit which the company is supposed

as above, is well settled by prior adjudications of this court. (Citing cases.)

"This is done in the exercise of the police power and the means to be employed to promote the public safety are primarily in the judgment of the legislative branch of the government, to whose authority such matters are committed, and so long as the means have a substantial relation to the purpose to be accomplished, and there is no arbitrary interference with private rights, the courts cannot interfere with the exercise of the power by enjoining regulations made in the interest of public safety which the legislature has duly enacted. (Citing cases.)"

In *Lehigh Valley R. Co. v. Board of Public Utility Comrs.* (1928), 278 U. S. 24, 73 L. Ed. 161, the railroad sought to enjoin enforcement of an order made by the [fol. 179-21] Board of Public Utility Commissioners of New Jersey requiring the railroad to eliminate two railroad grade crossings and to substitute in their place a single overhead crossing at the *sole expense of the railroad company* in the amount of $324,000. In addition to raising the usual constitutional objections, the railroad claimed that an adequate crossing could be built for at least $100,000 less than the amount it was required to expend under the order and also claimed that the order unconstitutionally imposed a direct burden on interstate commerce and violated the interstate commerce law in that the required expenditures exceeded the legal duties of the railroad and the reasonable requirements of public safety and convenience. The case was instituted in the United States District Court and was heard by a three-judge court which dismissed the bill. On appeal the Supreme Court affirmed the decree of dismissal and, speaking through Mr. Chief Justice Taft, said (278 U. S. 33, 73 L. Ed. 166):

"This highway is not infrequently crowded with vehicles. When route No. 29 is completed, it will certainly be more crowded. The immediate prospect of using new route 29 makes greater room in the roadways most desirable. The large expenditure to secure such

advantages does not seem to be arbitrary or wasteful when made for two busy highways instead of one.

"It is not for the court to cut down such expenditures merely because more economical ways suggest themselves. The board has the discretion to fix the cost. The function of the court is to determine whether the outlay involved in the order of the board is extravagant in the light of all the circumstances, in view of the importance of the crossing, of the danger to be avoided, of the probable permanence of the im-[fol. 179-22] provement and of the prospect of enlarged capacity to be required in the near future and other considerations similarly relevant.

* * * * * * * * *

(278 U. S. 34, 73 L. Ed. 167): "A railroad company in maintaining a path of travel and transportation across a state, with frequent trains of rapidity and great momentum, must resort to reasonable precaution to avoid danger to the public. This court has said that where railroad companies occupy lands in the state for use in commerce, the state has a constitutional right to insist that a highway crossing shall not be dangerous to the public, and that where reasonable safety of the public requires abolition of grade crossings, the railroad can not prevent the exercise of the police power to this end by the excuse that such change would interfere with interstate commerce or lead to the bankruptcy of the railroad. (Citing cases.) This is not to be construed as meaning that danger to the public will justify great expenditures unreasonably burdening the railroad, when less expenditure can reasonably accomplish the object of the improvements and avoid the danger. If the danger is clear, reasonable care must be taken to eliminate it and the police power may be exerted to that end. But it becomes the duty of the court, where the cost is questioned, to determine whether it is within reasonable limits.

* * * * * * * * *

(278 U. S. 35, 73 L. Ed. 167): "The care of grade crossings is peculiarly within the police power of the states (citing cases), and if it is seriously contended that the cost of this grade crossing is such as to interfere with or impair economical management of the railroad, this should be made clear. It was certainly [fol. 179-23] not intended by the Transportation Act to take from the states or to thrust upon the Interstate Commerce Commission investigation into parochial matters like this, unless by reason of their effect on economical management and service, their general bearing is clear."

So zealously have the courts guarded the police power of the states and their political subdivisions with respect to railway crossings of highways that they have held in numerous cases where municipalities have by contract agreed with railway companies to pay the expense of maintenance and repair of grade separation structures after their construction, that such contracts are void as against public policy since they constitute the virtual abdication of sovereign powers, it being said in such cases that the "police power cannot be contracted away." See for examples: *Chicago M. & St. P. R. Co. v. Minneapolis* (1914), 232 U. S. 430, 58 L. Ed. 671, and *Northern Pacific R. Co. v. Minnesota ex rel. Duluth* (1907), 208 U. S. 583, 52 L. Ed. 630. In the latter case the court, speaking through Mr. Justice Day, said (208 U. S. 596, 52 L. Ed. 636):

> "There can be no question as to the attitude of this court upon this question, as it has been uniformly held that the right to exercise the police power is a continuing one, that it cannot be contracted away, and that a requirement that a company or individual comply with police regulations without compensation is the legitimate exercise of the power, and not in violation of the constitutional inhibition against the impairment of the obligation of contracts. (Citing cases.) . . . We find no error in the judgment of the Supreme Court of Minnesota holding the contract to be void and beyond the power of the city to make, and it will, therefore, be affirmed."

[fol. 179-24] Many other decisions both by the Supreme Court of the United States and by state courts of last resort might be cited in support of this point. The courts are practically unanimous in announcing the law to be as the above cited and quoted cases declare it.

Point III.

The Power and Right of the States and Their Political Subdivisions to Require Separation of Grades Between Railroads and Highways or Streets and to Require the Railroads to Pay All or Any Part of the Cost Thereof Extends to and Includes the Right to Require Railroads to Pay All or Any Part of the Cost of Altering or Reconstructing Existing Grade Separation Structures.

The courts have had no difficulty in extending the application of the rule announced in Point II to cases where, by reason of the demands of increased traffic, an existing grade separation has become inadequate and it has become necessary to widen or otherwise enlarge either an underpass or a viaduct carrying the highway or street, and the state has cast all or a part of the financial burden upon the railroads. Many of the cases hold that statutory authority, such as we have in Section 1202 of our Public Utilities Codes, conferring jurisdiction over railroad-highway crossings upon a regulatory body, such as the Public Utilities Commission, include and grant to such bodies the power to require alteration or reconstruction of existing grade separation structures. In *New York C. & St. L. R. Co. v. Singleton* (1934), 207 Ind. 449, 190 N. E. 761, the Supreme Court of Indiana, in affirming an order of the Public Service Commission of that state directing the railroad to reconstruct and widen a highway underneath [fol. 179-25] its tracks, at its own expense, quoting from the opinion of the Public Service Commission, which in turn quoted the case of *Southern Indiana R. Co. v. McCarrell*, 163 Ind. 469, 71 N. E. 156, said: (1904)

> "'The public does not lose control of public highways by reason of railroad crossing construction. Duties of railroad companies to the public do not end with construction of the crossing. That does not re-

leave the railroad from necessary, future obligation; the obligation is continuing. The adequacy of the crossing to accommodate the public must be made to meet the reasonable demands of the times. . . .'"

In *State ex rel. Alton R. Co. v. Public Service Commission* (Mo. 1934), 70 S. W. 2d 55, the Supreme Court of Missouri, in upholding an order of the Public Service Commission of that state requiring the railroad to pay half the cost of replacing an old steel and wood viaduct over a railroad, said:

"It is also contended here, by the railroad, that the commission's order is unfair, unreasonable, and unjust because this was not a grade crossing and because the present bridge was adequate and no reasonable necessity for the project was shown. The railroad contends that for a town of 753 people no better bridge is necessary. We cannot agree with this contention. The present bridge was built in 1900; its narrow travel space, its small load capacity, and its 'camel-hump' construction would seem to classify it as a relic of those 'horse and buggy days.' Jackson county has more than doubled in population, as have its principal cities, Kansas City and Independence, since this bridge was built. Even Blue Springs and its neighboring small towns have considerably increased in size; but of greater significance than this [fol. 170-26] remarkable growth in population has been the development of modern motor transportation and the increase of traffic caused thereby during the existence of this old bridge. Whether the amount of traffic developed by the greater population of Jackson county and the 'motor age' required a new concrete slab from United States highway 40 through Blue Springs to the Independence road was not for the consideration of the Public Service Commission. (Citing cases.) But, the county having decided to build such a road, the question of the place and manner of its crossing, which the welfare and safety of the public required, was for the commission alone to decide. Section 5171, R. S. 1929 (Mo. St. Ann §5171,

p. 6685.) The modern 18-foot concrete pavement which is being built to this bridge would seem to require more than its less than 16-foot width to make the crossing safe for the traveling public."

In *State ex. rel. Alton R. Co. v. Public Service Commission* (Mo. 1934), 70 S. W. 2d 57, the same court, in upholding an order of the Public Service Commission authorizing the widening of a concrete viaduct over a railroad, said (70 S. W. 2d 60):

"The state has the right to build its other public highways, for travel by other means, over across, or under the railroad. To accommodate such travel, it has the right to build new roads across railroads at new places and provide for the necessary kind of crossing, or to widen existing roads and alter such crossings already established, as the public interest may in either case reasonably require. *If it did not it would no longer be the sovereign.* To exercise its police power for the preservation of the public safety, this state has through the Legislature designated the [fol. 179-27] Public Service Commission as the exclusive agency to determine and prescribe the manner and point of new crossings and to alter or abolish established crossings, apportion the expense, either of making new crossings or alterations of existing ones, and to provide for their maintenance.

"'*Salus populi suprema lex est*' is the fundamental principle of the police power of the state, as well as our state motto. Private corporations, accorded the privilege of operating railroads, declared to be public highways of the state, for the purpose of private profit, must pay a reasonable proportion of the cost of improvements, which the presence of their tracks make or contribute to make necessary, for the welfare and safety of the people of the state. We therefore hold that the Public Service Commission has the authority not only to provide for a separation of a grade between a public highway and a railroad, when conditions make that necessary and proper, but that it also has the power, whenever the manner of cross-

ing formerly prescribed by it becomes inadequate in width, height, or strength, to reasonably provide for the safety and welfare of the traveling public thereon, to order it reconstructed to meet their reasonable needs." (Emphasis added.)

The basis of the rule which requires railroads to keep pace with the needs of increased traffic on highway crossings of their tracks by repairing or, if necessary, replacing old grade separation structures, is well stated in the case of *St. Paul v. G. N. R. Co.*, 177 N. W. 492, 145 Minn. 355, as follows:

"The railroad's interference with safe public travel is continuous and the obligation of the railroad to [fol. 179-28] conserve the safety and convenience of the public, imposed under the police power, is as continuous as its interference with safe public travel. * * *

"We hold that the uncompensated duty rests upon the railroad to keep the surface of its bridge in fit condition for public travel; that the duty is cast upon it in the exercise of the police power; and that requiring it to furnish at its own cost an appropriate surface for travel is not the exercise of the taxing power and does not offend any provision of the federal Constitution."

Again, in the case of *Boston and M. R. Co. v. County Commissioners of Middlesex Co.*, 131 N. E. 283, 286, 239 Mass. 137, the Supreme Judicial Court of Massachusetts states the same rule as follows:

". . . . It is long since settled that the obligation of a railroad not to obstruct at a crossing the use of a public way is a continuous one, not measured by its duty when the way was located, but one that enlarges to meet the statutory requirements that public ways shall be kept reasonably safe and convenient for travelers at all seasons of the year . . . ."

The California Public Utilities Commission has for many years recognized the principle that the state has the right and power to impose upon a railroad all or any part of

the cost of reconstructing inadequate grade separation structures.

Town of Larkspur, 37 C. R. C. 901, 905;
People ex rel. Department of Public Works, Public Utility Reports, 1923 D. 545.

[fol. 179-29] PART IV.

There Is No Logical or Legal Basis for the Contention That the Costs of This Grade Separation Improvement Should Be Borne by the Parties Respectively in Accordance With the Benefits to Be Received by Them, nor Are Any Such Benefits Mathematically Calculable.

Petitioner contends that the costs in the case should be allocated on the basis of respective benefits because, they say, this is the method of allocation of the costs of grade separations when highway construction is financed under the Federal-Aid Highway Act of 1944.

In this contention the petitioner wholly fails to recognize the essential distinction between the present case and that of highway construction under Federal-Aid Acts. The instant case represents an exercise of the police power by a municipality in its right to maintain and improve a public street, and the exercise of the police power by the State Public Utilities Commission in allocating expenses of widening existing grade separations, such widening being required by the public safety, convenience and necessity. The improvement is not to be financed in any part with federal aid funds.

The fact that the Federal-Aid Highway Act of 1944 and its predecessor acts limit, and in some cases eliminate, the imposition of any charge upon railroads for the cost of grade separations or modifications thereof is of no consequence here. That act does not represent an exercise of the police power by a sovereign state, but is merely an instance of a voluntary and benevolent expenditure of public funds for the benefit of the public and the various states. Obviously the Federal Government, being subject to no applicable constitutional limitations in such cases, is [fol. 179-30] free to prescribe any conditions or limitations it chooses to place upon the distribution of any such gra-

[illegible] Any state not desiring to accept the federal aid subject to the prescribed conditions and limitations is free to do so. Moreover, if such prohibitive costs to be established upon the imposition upon the railroads of their fair share of the cost of grade separations, the very objective of the Act would have been defeated.

We are quite sure that the petitioner has been misled by this policy of the Federal Government and has thus fallen into the error of believing that the police power of the state and municipalities has likewise been curtailed to fit the pattern of federal generosity. Such a concept is utterly foreign to the fundamental principle of our dual separate systems of government.

In addition to the foregoing, the courts have upheld our position in the few cases in which the question of relative benefits has been presented to them where no federal aid was involved.

In the case of *State of Missouri ex rel. Wabash R. Co. v. Public Service Comm.* (Mo., 1926), 289 S. W. 24, 317 U. S. 100 A. L. R. 754, where the Public Service Commission of the State of Missouri assessed against the railroad 20% of the cost of an elaborate grade separation through a public park, the Supreme Court of Missouri in upholding this order, said (289 S. W. 24, 27):

> "The Wabash argues strenuously that the appropriate use of the grade was purely for the benefit of the residents and users of the streets on the highway, and that the per cent of cost of the improvement assessed against the railroads was grossly out of proportion to benefits received by them. [illegible] [illegible] [illegible]

[redacted]

existing subway was found inadequate and the major portion of the cost of enlarging the structure for the

sole purpose of accommodating the travel upon the streets that crossed against the railroads. This court in the course of the opinion said: "[T]he [illegible] safety of passing trains is only one of the elements to be considered in matters of this kind. It is not the sole or controlling element. The convenience and necessities of the traveling public using highways, streets and thoroughfares is considered. We are not discussing a principle, however, where cases and cases where the presence of a railroad renders a street inadequate to accommodate the traveling public." (Emphasis added.)

In the case of *State ex rel. Chicago, R. I. & P. Ry. Co. v. Public Service Commission* (Mo., 1924), 73 A. V. R. 191, the Supreme Court of Missouri, in sustaining an order of the Public Service Commission dividing the costs of re-constructing an old highway underpass equally between [Fol. 179-23] the county and the railroad, said (73 A. V. R. 191):

"[I]t the contention that the whole cost of the re-construction of the grade separation should be borne by St. Louis county because safety will dictate it should, we may say in the words of the court, used in *State ex rel. Kansas City Southern Ry. Co. v. Public Service Commission*, 305 Mo. 668, 267 S. W. (2d) 113, loc. cit. 119: 'There is no question of expenditure of funds in the case. It is a question of providing for the public safety by reasonable methods. The results will inure to public good in the manner which the Commission, in what was deemed in the lower court a reasonable way, has undertaken to provide. The matter involving [illegible] between the approaching trains was reasonably safe in that day. But in this day of motor vehicles it is full of perils of collisions of automobiles with each other as well as with the trains. Expert witnesses for the county and for the railroad testified to these hazards."

In the case of *Lehigh & N. E. R. Co. v. Public Service Commission* (1927), 191 Atl. 880, 882, the Superior Court of Pennsylvania, in approving an order of the Public

Service Commission of this state requiring the construction of an elevated and underground railroad and abolishing the grade crossings within the county and the city and, said:

"The order of the commission was within its power and supported by the evidence and is reasonable and in conformity with law.

"Those conditions which may have brought about the necessity for a new underpass do not continue to subsist indefinitely. It is a question of providing for public convenience and necessity. The underpass [illegible] may [illegible] at any time become inadequate or unsuitable for the purpose for which it was originally intended. In order to protect the public in the enjoyment of its rights, it may be necessary, if the facts warrant it, that the underpass shall be appropriately changed. Appellant's contention that it will receive no benefit from the proposed construction is not convincing. The question of benefits is not involved. It is the existence and operation of the grade crossings, and the hazards incident thereto, which [illegible] on the railroad." Lehigh Valley R. R. Co. v. Public Service Comm., 105 Pa. Super. 428 at page 434, 163 A. 468 at page 470."

It seems to the railroad were a relevant consideration in this case, the writer will point out that it would be within the constitutional power of the sovereign State of California, acting through the Public Utilities Commission, to order that crossing to be abolished as grade and to be elevated to the full width of the street, compelling the writer to accommodate the increased flow of the vehicular and pedestrian traffic. Then, for reasons of safety and giving due consideration to the needs of both railroad and street traffic it would be necessary at times to stop either the railroad traffic or the street traffic. The resulting delays to the railroad as well as the increased hazard of accident and consequent possible liability of the railroad for public injuries would be incalculably great. With respect to the likelihood of public liability of the railroad for accidents the words of Mr. Justice Holmes in the case of *Erie R.*

Co. v. Bor'd of Public Utility Comrs., 254, U. S. 394, 413, 65 L. Ed. 322, 335, are characteristically pertinent and concise:

> "If we could see that the evidence plainly did not warrant a finding that the particular crossings were [fol. 179-35] dangerous, there might be room for the argument that the order was so unreasonable as to be void. The number of accidents shown was small, and if we went upon that alone we well might hesitate. *But the situation is one that always is dangerous.* The board must be supposed to have known the locality, and to have had an advantage similar to that of a judge who sees and hears the witnesses. The courts of the state have confirmed its judgment. *The tribunals were not bound to await a collision that might cost the road a sum comparable to the cost of the change.*" (Emphasis added.)

In petitioner's Point IV reference is made to the case of *Lehigh Valley Rd. Company v. Board of Public Utility Commissioners* (1928), 278 U. S. 24, 73 L. Ed. 161, 167. In our Point II we fully discussed that case, so here it is sufficient to state that in that case the Supreme Court of the United States sustained the action of the Commission in requiring the railroad at its sole expense to provide a grade separation. The language to which petitioner referred on page 38 of its brief had to do with the type of structure ordered, not the allocation of 100 per cent of the cost to the railroad. Further, even with respect to that matter the Supreme Court held that it was not for the court to cut down the expenditure merely because more economical ways suggested themselves. However, in the instant case this point is not even involved because the City acquiesced in using the type of structures which were most satisfactory to the petitioner.

The Nashville Case.

Petitioner stresses the case of *Nashville, C. & St. L. R. Co. v. Walters* (1935), 294 U. S. 405, 79 L. Ed. 949. In considering that case it should first be emphasized that,

[fol. 179-36] as shows by the findings of the trial court, quoted by the Supreme Court, (1) "this underpass is a part of a state-wide and nation-wide plan to foster commerce by motor vehicles on the public highways, the result of which is to afford competition with railroads and that the decision to build this underpass, its location and construction, was not in any proper sense an exercise of the police power, * * *"; (2) "the State highways of Tennessee (as distinguished from county and city roads and turnpikes) have their origin in the Federal-aid highway legislation. * * *" Such finding further emphasizes that "the immediate interest of the Federal Government is, in part, the national defense as well as the transportation of the mails. The relief of the unemployment incident to the business depression has been the main incentive for highway construction since April 4, 1930—the period in which the highway here in question was undertaken and completed."

Finding No. 2 again refers to Federal-aid highways and their incidents. Finding No. 4 shows that "'Lexington is a rural community of 1823 inhabitants located in a sparsely settled territory. The construction of the new highway with the underpass was not designated to meet local transportation needs. It was undertaken to serve as a link in a nation-wide system of highways."

Finding No. 5 shows that "the underpass required is for a new and additional highway over which State Highway No. 20 is being rerouted, which will be a part of the Federal-aid route between Nashville and Memphis, * * *"

Finding No. 6 shows that "the new highway, paralleling lines of the Railway and intended for rapid moving motor [fol. 179-37] vehicles, will, through competition for both freight and passenger traffic, seriously decrease rail traffic and deplete the Railway's revenue and net earnings. Practically all vehicles moving upon it will directly or indirectly compete for traffic with the Railway."

Finding No. 7 shows that the railroad was to pay one-half directly and a portion of the other half indirectly; that a portion was to be paid by Federal aid, and that only a very small portion was to be paid by the truck and bus owners who would use the facilities.

It will be noted that none of these conditions are present

in the present case. We are not presently concerned with an underpass which is part of a nation-wide system being constructed pursuant to a nation-wide plan to foster commerce by motor vehicles. Instead, we are concerned with a City street handling local traffic, where the separation is necessary in the interest of the public health, safety and general welfare. It is not a Federal-aid highway, nor even a State highway, but is a City street to be constructed with City funds. The street here involved is designed to meet local transportation needs of a City having a population of over 2,000,000, as distinguished from a highway which forms part of a nation-wide highway system, and which highway incidentally passes through a rural community of 1623 inhabitants. It is not designed for the purpose of providing a nation-wide system of highways to foster commerce by motor vehicles in competition with railroads, nor does it parallel the Railroad. Instead, the evidence shows clearly that the primary purpose is to provide for local transportation needs. It is not being constructed by Federal-aid money, but by the City with City funds. It is not a [fol. 179-38] "make-work" project to relieve unemployment, but instead a necessary improvement of a City street.

In other words, the grade separation here involved is one which is, in its proper sense, a valid exercise of the police power necessary to protect the public health, safety and general welfare.

It is plainly apparent that the *Nashville* case can have no bearing on the problem here presented.

Cases more recent than the *Nashville* case clearly establish that such case was not a reversal of the many prior cases holding that a railway could be required to pay up to 100 percent of the cost of a grade separation. Instead, the *Nashville* case is applicable only to the factual situation there presented.

The case of *Lyford v. State of New York*, 140 F. 2d 840, decided in 1944, involves a claim of the State of New York against an insolvent railroad. The claim arose under the New York Grade Crossing Elimination Act of 1926:

> "* * * This act empowered the State Public Service Commission to order the elimination of any grade crossing which in the Commission's opinion was a

menace to the public safety. Half the cost of the elimination was to be borne by the railroad whose crossing was to be eliminated, half by state and county governments, in the proportion of 49 per centum by the State and one per centum by the county or counties in which the crossings were located. If the railroad so elected, the State was authorized to pay the railroad's share in the first instance, the railroad being obliged to repay the State in a manner to be determined by the State comptroller, so that the principal and interest of the State debt incurred for such elimination might be repaid when due." (Pp. 841-842.)

[fol. 179-39] Under these provisions the railroad became indebted to the State in the amount of some $425,000. Thereafter the railroad filed a voluntary petition for reorganization under Section 77 of the Bankruptcy Act. A claim was filed by the State and the question was raised as to the validity of such claim.

In holding the claim valid, the court stated (p. 844):

"* * * It is well settled that in the exercise of its police power for the protection of its citizens a state may require of even an interstate railroad that it abolish grade crossings at its own expense entirely, whatever the cost and without regard to its financial ability. See extensive discussion by Holmes, J., in *Erie R. Co. v. Board of Public Utility Com'rs*, 254 U. S. 394, 41 S. Ct. 169, 65 L. Ed. 323, citing earlier cases; * * * (citing cases). *Hence this duty which could have been required of the railroad alone, is here shared* with the state and county governments; and the additional privilege of installment repayment is also granted, but only upon conditions carefully safeguarding the interests of the State." (Emphasis added.)

A petition for a writ of certiorari to the United States Supreme Court was of course denied. (323 U. S. 714, 89 L. Ed. 574 (1944).)

This recent case gives no indication of any "trend" claimed by petitioner, and we again wish to emphasize that

the *Nashville* case, by its very terms, turns upon a finding that the elimination of the grade crossing there involved [fol. 179-40] "*was not in any proper sense an exercise of the police power,*" (79 L. Ed. 949, 956, 304 U. S. 405, 417), and was to a large degree an expenditure "*for the relief of unemployment*" (79 L. Ed. 949, 957, 304 U. S. 405, 418-419).

The matter involved in the *Lyford* case was again before the Court in *State of New York v. Gebhardt*, 151 F. 2d 902, certiorari denied 327 U. S. 788, 90 L. Ed. 1015.

Of course, it should also be mentioned that here again State highways and State funds were involved, rather than a city street. The railroad's obligation, as heretofore shown, is much greater when city streets are involved. This is undoubtedly the basis of the later amendment to the New York Act.

A case decided at approximately the same time as the *Nashville* case is that of *In re New York O. & W. Ry. Co.*, 280 N. Y. Supp. 174 (affirmed 3 N. E. 2d 188). That case clearly indicates that the true rule is whether or not the public benefits; if so, the grade crossing may be eliminated regardless of benefit to the railroad, and the railroad can constitutionally be required to pay the entire cost, although in that case the statute only required the railroad to pay one-half of the cost.

Again in 1937, in the case of *In re Elimination of Highway-Railroad Crossings*, 299 N. Y. Supp. 693, the railroads were required to pay one-half of the cost, as provided by statute, regardless of the fact that "the New York Central urges two objections to the order. It insists that it not [fol. 179-41] only derives no benefit whatever from the new construction, but that it is decidedly damaged by reason of the change," especially in view of the fact that there was already an underpass under its tracks and that the new alignment would require its patrons to travel some 7000 extra miles each year to reach its station.

Incidentally, it might be mentioned that included in the cost of that grade separation was the cost of paving some 3,332 feet of new highway outside the subway itself.

There is, of course, a fundamental difference between a crossing separation which is a "make-work" project,

using Federal funds, and a crossing separation which is admittedly necessary for the public health, safety and general welfare; or between a grade separation for private benefit, and a grade separation required by the public health, safety and general welfare. An analysis of the cases will show that regardless of direct benefit, the Railroad "has a continual obligation to participate in the matter of constructing and maintaining reasonable and adequate crossings over its tracks both at grade and at separated grades." (37 C. R. C. 787.) Further, "It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings, but also to build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their tracks, or to carry their tracks over such highways." (*Erie R. Co. v. Board of Public Utility Com'rs* (*supra*), 254 U. S. 394, 409, 65 L. Ed. 322, 333.) The element of direct benefit is absolutely immaterial.

[fol. 179-42] POINT V.

THE SO-CALLED BENEFITS THEORY.

Petitioner's principal position appears to be that of advocating an allocation of expenses on the so-called benefits theory. We do not subscribe to this theory for many reasons: (1) it is impossible to compute real benefits with any degree of certainty; (2) it completely disregards the legal rights of the City of Los Angeles to use its streets free from obstruction or interference; (3) it further disregards the legal obligations inherent in the operation of the railroad. However, in view of the strenuous argument made by the Company in this regard, we feel it might be well to call attention to some of the benefits received by the railroad.

A. General Principle to Be Used in Determining Benefits Received by Railroad.

First, there can be no question that, as a matter of equity, if the railroad is to be given the right of way over vehicular traffic at a point where the railroad crosses a public street, then all costs incident to making such cross-

ings safe should be assessed against the railroad. This being so, it necessarily follows that when the inconvenience to the public resulting from giving the railroads such right of way becomes so oppressive and hazardous to the public that a grade separation is necessary, the railroad should be required to pay the cost of such grade separation in excess of that which it would cost the City to improve the public street in the absence of the railroad. We recognize that the method of railroad operation is such that it would be [fol. 179-43] extremely costly and impractical, if not impossible, to require the Railroad to yield the right of way to vehicular traffic. That is the reason the railroads have received special consideration and have been accorded the right of way. However, as an incident of, and a condition upon which the railroads were accorded such special treatment the obligation to provide safe grade crossings and necessary grade separations was properly levied against the railroad. If the railroad would operate in the same manner as other traffic and comply with the laws of the road applicable to other traffic, this special burden would of course not be assessed against the railroads; there would be no necessity for such special treatment. But the special privileges enjoyed by the railroads, accorded to them so that they might operate in a preferred manner, entail certain obligations, of which this is one.

Therefore, the entire premise upon which Mr. Jenkins and other company witnesses attempt to determine the benefits accruing to a railroad from a grade separation is entirely false. *This is so as their computations and opinions have all been predicated upon the assumption that the railroad has the absolute and unconditional right to operate in total disregard of all other traffic, both vehicular and pedestrian.*

Mr. Jenkins, commencing at page 332 of the transcript (rehearing), was referring to the factor of delay. He stated that the "Johanson formula" showed that there was a material value that could be placed upon the delay to highway traffic. However, he admitted that that formula [fol. 179-44] did not go into the question of delay to rail traffic at all. With respect to whether or not the Railroad

obtained any benefit from the elimination of the delay hazard, he testified:

"A. I don't believe that in ordinary cases the delay factor, as it affects the railroads, is measurable. In most instances the railroad has established speed limits which are not as closely regulated by the volume of highway traffic as the delay to highway traffic is controlled by the volume of rail traffic. In other words, it is presumed that the protection afforded at the railroad crossing maintained by the railroad is sufficiently adequate to protect the highway traffic and the delay results to the highway traffic. There is very little delay, really, that can be attributed to the rail traffic with the exception of those instances where the rail lines may be in particularly populated cities or metropolitan areas where the general speed limit is slow.

Q. And the railroads are given priority over the vehicle traffic at grade crossing, by virtue of these protective devices? A. That is right.

Q. And don't you think there is some corresponding obligation to the railroad in cases where a grade separation becomes necessary because of the advantages they have been given that they should pay the cost of the grade separation? A. No, I don't subscribe to that theory.

Q. Isn't that grade separation comparable to the installation of these signalling devices? A. No.

Q. Why should the railroads be given priority over vehicle traffic, when, according to your own testimony, the rail traffic is decreasing, and the vehicle traffic is increasing? A. Well, there is a point of practicability involved. Highway traffic is continuous traffic. It consists of a continuous stream of traffic, [fol. 179-45] whereas, by contrast, the railroad operation is relatively infrequent and intermittent so that it wouldn't be practical to attempt to let the highway have free access and make the trains or the rail traffic wait for the highway traffic." (Tr. RH., p. 333, line 18, to p. 334, line 25.)

And when asked if in cases where there is synchronized control of traffic the railroads should be required to stop

at those synchronized signals, Mr. Jenkins answered: "No." (Tr. RH. 336.) When asked to explain the basis for his answer, he stated:

"A. I think it would be entirely impractical. A railroad couldn't operate under such conditions, a main line railroad.

Q. Why couldn't it operate under such conditions? A. Well, for several reasons. One of the principal reasons is that ordinarily a railroad train is of such length that it would obstruct more than one intersection, and if it were required to stop at each intersection in a thickly populated territory such as Los Angeles, that would mean that it would be obstructing two or three intersections at the time, and with the weight of a railroad train, to get under way with a normalized interval, signal interval, it couldn't time it within the time of the signal.

Q. So, the railroad constitutes a special type of hazard or nuisance, and should be required to provide facilities for its occupation—

Mr. Cummins: I object to the reference of the railroad as a nuisance.

Commissioner Huls: That portion refetring to nuisance may go out.

Mr. Arnebergh: It requires a special type of operation, does it not?

[fol. 179-46] The Witness: If you are saying that it is something special, it must be special with relation to something else.

Q. We were talking about traffic. A. Yes, surely.

Q. Therefore, that being true, should it not be required to provide the extra facilities necessary for that operation, rather than the public? A. No. You might look at it exactly from the reverse angle, that the highway traffic is a special type of traffic that needs special consideration.

Q. Can't highway traffic adjust itself to synchronized signals? A. Yes.

Q. Didn't you just say that a train couldn't? A.

No, it can't." (Tr. R.H. p. 336, line 7, to p. 337, line 16.)

He further testified that his opinion that the fault in regard to motor deaths and injuries at railway highway grade crossings lies primarily with the motorists and is largely completely out of the hands of the railroad was true only on the basis that the railroads have full right of way at grade crossings and are not subject to the ordinarily rules of right of way pertaining to other traffic at intersections. (Tr. RH. 405.)

Mr. Lee E. Sievert, Executive Representative of the President of the Santa Fe Railroad Company, admitted that if a main line train had to stop at a street crossing to let highway traffic go across there would be a detriment to the railroad. (Tr. RH. 402.)

Other instances can be cited to indicate that the entire evaluation of benefits which the railroad receives through the elimination of grade crossings are computed by the railroad on the fallacious assumption that the railroad is [fol. 179-47] given the right of way over vehicular traffic without incurring the corresponding liability to make grade crossings safe, and, when public convenience and necessity require, to provide necessary grade separations.

But the railroads have not been given the right of way over other traffic without having placed on themselves the obligation to provide necessary crossing protection, and to provide, at their sole expense, grade separations when required by the public convenience and necessity.

As was stated by the Supreme Court of the United States, speaking through Mr. Chief Justice Hughes, in *Chicago, M. & St. P. R. Co. v. Minneapolis* (1914), 232 U. S. 430, 58 L. Ed. 671 at 674:

> "It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings, but also build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their tracks, or to carry their tracks over such highways."

Numerous other cases, holding that a railroad is obligated to pay the entire cost of a grade separation, could be cited. This has always been the law, and it is still the law.

The only time the railroad is not required to pay the full cost of a grade separation is where there is a statutory provision specifically providing otherwise. Such statutes indirectly provide further subsidies to the railroads and are, in effect, gifts of public funds to the railroads. In California the statute does not provide any specific amount which the railroads shall be relieved of paying, but instead leaves it to the discretion of the Public Utilities Commission. In our opinion, it would be an abuse of discretion for the Commission to apply the so-called benefits theory on the basis argued for by the railroads. To do so would [fol. 179-48] be totally unrealistic and would completely disregard the legal and equitable obligations of the railroad.

If the railroads are no longer willing to assume the burden necessarily imposed upon them as a concomitant part of the special privileges they enjoy, then let them also relinquish their special privileges.

B. Benefits From Longer Trains.

In connection with the benefits which the railroad receives from a grade separation, there are of course numerous other matters which should be mentioned.

In this connection, the testimony of Mr. Gray is important. For example, at pages 494 to 496 of the transcript (rehearing) reference was made to the fact that with diesel locomotives the railroad can handle longer trains and more tonnage per train. He was then asked:

> "What is the operating effect of that? Is it a savings to the company to simplify the operation and to have longer trains? A. The basis of successful operations on a railroad is the handling of traffic with one unit of power. In other words, ton miles is the basis of our cost figure, and that follows that the more tonnage you can handle in one train, the cheaper you can do it.
>
> Q. *And of course, the longer the train, the better for you?* A. *That is right.*
>
> Q. *Regardless of the fact that it might delay a crossing or block a crossing for a longer period of time?* A. *That might be true.*" (Tr. RH. p. 495, lines 2-13.)

Surely, with longer trains, which are a benefit to the railroad, the railroad receives a greater benefit from a grade separation. *But for the existence of grade separations at critical crossings the public would not endure the intolerable delays at these grade crossings which would result from these longer trains.* In fact, the public, in righteous indignation, would demand the elimination of all grade crossings at the expense of the railroads, if it were not for grade separations at major crossings.

C. Benefits From Use of Streets as "Feeder" for Railroad.

There are numerous other things to consider. First of all, it might be mentioned that the railroad itself materially benefits from use of the public streets as feeders for its railroad business. This is illustrated by the following testimony of Mr. Jenkins on cross-examination:

"Q. Speaking generally, now, as to the fact of rail passenger traffic, is it not true that probably 100 per cent of all passenger traffic handled by the railroads at some stage of their journey travel on city streets? A. Well, that's a pretty good estimate, I think, because they have to get to the depots.

Q. So that to that extent, the public streets are feeders and used as feeders for the railroad business, are they not? A. Yes, there is no doubt about it.

Q. And a comparable situation exists with respect to freight, isn't that true? A. That is largely so with the exception there is a larger percentage served directly by spurs by the railroads themselves that do not involve the truck connection." (Tr. RH, p. 414, line 25, to p. 415, line 18.)

Also, as shown at page 591 of the transcript (relating) and in Exhibit 62 RH, more vehicles use Washington Boulevard for the purpose of entering or leaving the Santa Fe Railway yard there for the purpose of entering or leaving any of the other properties immediately east of the underpasses.

[fol. 179-50] D. Benefits Accruing to Railroad From Elimination of Grade-crossing Accidents.

In connection with benefits received by the railroads

[illegible] grade separation, it is important to consider grade crossing accidents.

As was testified to by Mr. Frank H. Hitchcock, General Claim Agent of the Santa Fe Railway, in the four years 1947 to 1950 and the first six months of 1951, the Company had [illegible] grade crossing accidents in which [illegible] persons were killed and [illegible] injured. This is for Santa Fe operations alone. (Tr. RH. p. 468.)

While the Company claimed that the average grade crossing accident costs $750, this figure apparently only the actual claims payments made. It did not include the expenses that the Company was put to for investigation, for damage to railroad equipment, the delay to the train service, or any of such items. (Tr. RH. p. 470.)

As Mr. Hitchcock stated, in recent years the award to the railroad resulting from grade crossing has increased many fold, and a grade crossing is now a hazard to the railroad as well as to other traffic. (Tr. RH. 468.) Obviously, then, a railroad now receives many benefits than formerly from a grade separation.

He further testified that he knew that the damage to railroad equipment in connection with street crossing [illegible] was "very substantial." (Tr. RH. 468.) He also was asked: "Q. Do you frequently have serious damage to railway equipment?" (Tr. RH. 471.)

[illegible] Another witness, Mr. [illegible] Gray, General Manager of the Santa Fe, also testified with reference to this question. The following excerpt from his testimony is illustrative of his testimony:

Q. I am sorry, I am not familiar with your [illegible] operations, or your [illegible] operations. If [illegible] where there is a grade crossing, a train [illegible] crossing and hits an automobile, there is damage to the train, is there not, and damage to the automobile, and delay and disruption of your schedule, would there not, that would be added to your claim payments? A. There usually is. If you have to make repairs and train collisions, there invariably is some delay.

Q. If you happen to have an accident with a truck or something, then you have even a worse situation?

A. It might be, sir.

Q. And I suppose in some of the accidents you have had considerable damage done to your equipment? A. That is correct.

Q. Could you give us some illustration? A. Well, quite recently at Acton, a gasoline unit truck collided with our Super Chief, and practically destroyed one unit tractor as the building it is conveyed.

Q. About what was the damage to the railroad equipment in that case? A. Oh, I don't have those figures.

Q. Could you make an approximation? A. I would say it would run around $150,000.

Q. What was the delay experienced on your scheduling? A. Well, that particular train was delayed about two hours.

Q. Frequently, of course, if you had an accident—let me reframe that. If you had an accident at a [fol. 170-52] crossing such as this, where you had several tracks in quite a few scheduled movements, and you had considerable delay, it would interfere with many of your schedules, would it not? A. That is normally correct.

Q. And that has almost nationwide implications, does it not? A. Any serious delay would, of course, influence movements of traffic in either direction. Not only here, but further on down the line.

Q. Would you have any idea of the cost involved in an over-all re-scheduling and the delay resultant from an accident such as that? A. I haven't the least idea.

Q. It would be a tremendous figure, though, I suppose? A. Well, I wouldn't say that. It would involve, first, the extent of delay to the train that was concerned in the accident, and later with other trains that may be held up or detoured as a result of this particular accident. We would rather not take on too extensive delays. We would detour our traffic via other lines.

Q. Of course, that involves a considerable work, extra work, on your scheduling bureaus and so on?

A. Oh, yes. It requires some extra dispatching service, but we have organizations that are rather prompt about it.

Q. And other emergencies arise where you have grade crossings, of course? A. Yes, that is true to some extent, but I wouldn't say that it is nearly as serious, normally, that a collision is nearly as serious as a derailment of even one car.

Q. Isn't it frequent, I know I see in the papers frequent pictures where even the last time a little old 1926 Ford derailed a few freight cars? A. That occurs, but not frequently. Sometimes an automobile [fol. 179-53] will roll up under the diesel engine and steam engine and take some time to dislodge it.

Q. By 'some time,' do you have any— A. Sometimes you have to cut them out with welding torches or something of that sort. It may require up to two hours to get them out of there.

Q. When you have a derailment, what does it result in, for example, if you have a few cars derailed? A. Well, the first thing you would have to do is to call your wrecker and get the crane. That requires some little time to reach the derailment, depending on how far away the accident may be, and then the time that you would continue in re-railing the cars and straightening out your track and repairing it." (Tr. RII. p. 402, line 14, to p. 406, line 12.)

Further, as shown at page 189 of the transcript (rehearing), even in connection with accidents that do not cause any particular damage to railroad equipment there is a delay to the train in cases where people are injured or killed.

It will therefore be seen that, from the safety standpoint, a grade separation is a great benefit to the railroad, a benefit growing greater every day.

E. Benefit From Improved "Good-Will."

Another factor, although intangible, is "good-will." Certainly a railroad loses goodwill by these grade crossings. And I am not here referring to those poor unfortunates who are mangled and maimed by the trains, nor to the widows and orphans of the victims slaughtered at grade

crossing accidents. Neither am I referring only to the passengers who are on the trains delayed by the accident, nor to the relatives and friends of such passengers who [fol. 170-54] patiently (or impatiently) wait at the station to meet the arriving passengers, only to see the time of arrival of the train repeatedly changed to a later hour. Primarily I am referring to the motorist, who potentially is a patron of the railroad, either as a passenger or shipper, who, while delayed at a grade crossing, swears to never again patronize that railroad.

F. Benefit From New Structures.

Directing our attention specifically to the facts of this case, we find special circumstances of great importance. The bridges here involved are now some 38 years old. The Santa Fe depreciates bridges of this type on a 50-year life basis. (Tr. RH. p. 522.) The bridges are therefore more than 75 per cent depreciated.

Further, the construction of the bridges is now substandard. The Cooper loadings for one of the existing underpasses is E-36 and the other is E-60. (Tr. RH. p. 522.) However, as shown by Exhibit 61 RH, and at pages 580 to 582 of the transcript (rehearing), present A.R.E.A. officially recommended specifications have gradually increased and the present standard adopted in 1943 recommends a Cooper loading of E-72. It will therefore be seen that not only are the existing railroad structures old and approximately three-fourths depreciated, but they are now substandard and do not conform to the A.R.E.A. specifications for railway bridge liveloading specifications and standards. This of course becomes increasingly important in view of the testimony of various company witnesses to the effect that the railroads are now using longer trains with heavier loads. Obviously, the heavier loads require stronger bridges.

[fol. 170-55] Certainly the railroad will benefit from acquiring new, modern, stronger structures in lieu of old, obsolete, substandard structures 75 per cent depreciated!

Conclusion.

Throughout these entire proceedings the City of Los Angeles has maintained the position that the proper basis

of allocating expenses of a grade separation involving a city street is to require the City to pay the amount it would cost the City to improve the city street, in the manner proposed, if there were no railroad tracks; and to require the railway to pay the additional cost resulting from and necessitated by the presence of railroad tracks. As has been stated:

"* * * The true basis of apportionment of the cost has been declared by this court to be the extent to which the presence of the railroad at the place enhances the cost of a necessary improvement."

State of Missouri ex rel. Wabash R. Co. v. Public Service Comm., 100 S. W. 2d 522, 109 A. L. R. 754.

See, also:

State ex. rel. Kansas City Terminal R. Co. v. Public Service Comm. 272 S. W. 957.

The formula advocated by the City of Los Angeles can be applied with mathematical exactness in every case, and, in our opinion, gives full and proper consideration to both the legal and equitable principles applicable to grade separations. Further, this formula has been approved by a resolution adopted by the League of California Cities. [fols. 130-56-137] We strongly urged our viewpoint to the Commission; nevertheless the Commission allocated to the City the amount of $529,037.50, as compared with the amount of $111,750 which would have been allocated to the City under the formula which we believe to be most equitable. Had the Commission adopted our formula it would have allocated to the petitioner the sum of $701,015, instead of $284,577.50, as was done by Decision No. 47344.

However, we recognize that under the law the Public Utilities Commission has the exclusive power to allocate costs of grade separations. When, as here, the Commission, after a full and fair hearing, and based on adequate evidence and findings, and in the exercise of a sound discretion, makes an order allocating costs, then the order of the Commission is a final determination of the matter.

We therefore respectfully submit that the Petition for Writ of Review should be denied.

Ray L. Chesebro, City Attorney, Bourke Jones, Assistant City Attorney, Roger Arnebergh, Assistant City Attorney, Attorneys for the City of Los Angeles, a Respondent and Real Party in Interest.

[fol. 188]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

(Title omitted)

REPLY TO ANSWER OF THE RESPONDENT PUBLIC UTILITIES COMMISSION AND TO ANSWER AND BRIEF OF THE RESPONDENT CITY OF LOS ANGELES—Filed November 12, 1952.

(File endorsement omitted)

PRELIMINARY STATEMENT.

Petitioner herein seeks a Writ of Review for the purpose of obtaining a judicial determination of the lawfulness and constitutionality of Decision No. 47344 of the Public Utilities Commission (51 Cal. P. U. C. 771) which requires the Santa Fe Railway to pay half of the costs of reconstructing and enlarging two existing railroad bridges over Washington Boulevard in the City of Los Angeles.

The jurisdiction of the Supreme Court of California is invoked under the Public Utilities Code, Sections 1756-1760, under which the Supreme Court, and only the Su-

[fol. 189] preme Court, is authorized to review decisions of the Public Utilities Commission.

So. Calif. Edison Co. v. Railroad Commission (1936), 6 Cal. 2d 737, 59 P. 2d 808;

American Toll Bridge Co. v. Railroad Commission (1938), 12 Cal. 2d 184, 83 P. 2d 1.

The Commission has filed its answer to the Petition for a Writ of Review, hereinafter sometimes referred to as "P. U. C. Br." and the City of Los Angeles has filed its Answer and Brief in opposition to the Petition for Writ

of Review, hereinafter sometimes referred to as "City's Br."

The questions presented here involve the over-all problem of the allocation of costs in grade separations. The Commission considers the basic principles enunciated in its decision here (51 Cal. P. U. C. 771) as controlling since the decision of the Commission in this matter was subsequently followed and used as a basis of decision in the later "*Los Feliz*" case (51 P. U. C. 788). This latter case involved a typical grade separation where it is proposed to eliminate a grade crossing by constructing an underpass. The Court is urged to consider fully the matters presented here because the Commission has treated this matter as far reaching (51 Cal. P. U. C. 788) and beyond the particular facts presented in the record. The other railroads have recognized the importance of this matter by filing an extended Brief. Further the "*Los Feliz*" case is now before the Court in *Southern Pacific Company v. Pub. Util. Comm.*, S. F. No. 18704.

[fol. 190] I.

Petitioner Requests That This Court Exercise an Independent Judgment Upon the Law and Facts.

The Commission asserts that the railroad is asking for a trial *de novo* before the Supreme Court on all of the issues presented by this petition for a Writ of Review (P. U. C. Br. p. 12). Such is not the case. Petitioner does not ask the Supreme Court to look beyond the record made before the Commission (Pet. pp. 10, 53-57) except insofar as the Court may take judicial notice of changed circumstances today as compared with the earlier cases, with respect to increases in highway travel and changes in the types, size and volume of vehicles using the highways and related matters. The question of scope of review is discussed fully at pages 4 to 13 of the brief heretofore filed on behalf of the Southern Pacific Company and Union Pacific Railroad Company, as interested parties, and The Western Pacific Railroad Company and Pacific Electric Railway Company as *amici curiae*, hereinafter referred to as "other railroads," in support of the

instant Petition for a Writ of Review. Rather than expand this brief unduly, Santa Fe refers to the brief filed by the other railroads on this point as setting forth the correct rule of law upon the subject.

Petitioner would like to add, however, that it agrees with the Commission that the Commission in rendering its decision and order exercised a legislative function (P. U. C. Br. p. 29). Therefore, unless the Supreme Court grants the Writ requested, Petitioner will have no actual judicial review whatever.

[fol. 191] The order issued by the Commission is a complete reversal of the benefit principle of allocation of costs followed by the Commission since 1933 (see the *Goshen Junction* case, 38 C. R. C. 380) and it is a decision which departs completely from the Commission's stated position respecting *these exact same underpasses in 1932* (*Washington Boulevard* case, 37 C. R. C. 784), when the Commission held that since the vehicular public will receive the greatest benefit from widening these separations, it logically follows that the public should bear the greater portion of the cost. (See Section IV, pages 57 to 89 of the Brief filed by the other railroads for an extended discussion of this matter.)

Petitioner seeks a *judicial review* of a federal constitutional question. Petitioner does not ask to bring in new evidence, but does ask that the Court examine the evidence (Pet. p. 10) and exercise its *independent judgment* as to both the law and the facts as provided by Sections 1757 and 1760 of the Public Utilities Code. Petitioner respectfully points out that nothing is said in Section 1760 or any other to the effect that in exercising *independent* judgment the Court must first overcome a presumption (as urged by the Commission) that the Commission's findings are constitutional.

Unless this petition is granted the railroad is faced with a final order of an administrative body acting as a combination legislature, judge, jury and reviewing tribunal. The Commission says that its order is tantamount to a statute; that it cannot be set aside unless the Court can say that it was impossible for a fair-minded board to come to the result that was reached (P. U. C. Br. p. 33);

or a least that "any substantial evidence" is sufficient to justify the order (P. U. C. Br. p. 38); and, finally, that the [fol. 192] Court may not "substitute its judgment" for that of the Commission (P. U. C. Br. p. 32).

Petitioner's position is that the Commission ignored the evidence, made findings contrary to the evidence, substituted its arbitrary "discretion" in the matter without the support of substantial evidence, and reversed its own rules and standards, of twenty years' standing, for reasonably applying the police power in cases of this type. Instead of reappraising the liability of the parties the Commission reverted to rules and standards established almost forty years ago.

This Court has held in *Southern Pac. Co. v. Railroad Comm.* (1929), 13 Cal. 2d 125, 87 P. 2d 1052 at page 130, that the Commission must not decide the issues upon the basis of its own concepts and must not disregard the evidence.

The legislature itself has stated just how much finality the Commission's orders shall have and thus by statute (P. U. C. Sec. 1760) prevented the Commission from exercising unbridled power based upon the arbitrary "discretion" of its members, by specifically providing for *independent judicial* review of a federal constitutional question.

The Commission states that Section 22 of Article XII of the California Constitution permits the legislature to delegate powers to the Commission without any restraint by the State Constitution (P. U. C. Br. p. 33). But the point is, the legislature did not delegate to the Commission all the power of the State but reserved to the Supreme Court an *independent judgment* in a case, such as this, involving a federal constitutional question.

[fol. 193] The case of *Alabama Public Service Comm. v. Southern R. R. Co.* (1951), 341 U. S. 341, 95 L. Ed. 1004, relied upon so strongly by the Commission, lends no support to the Commission at all since Alabama did provide for an independent judgment as to both the law and facts by both the county court and by the State Supreme Court.

With the above background of the law in mind we respectfully point out on the record made before the Commission there is no basis in the evidence for the finding

of the Commission that Washington Boulevard must be widened at the location of the underpasses to meet *local transportation needs*. This is a half truth and is therefore untrue. The abstract of evidence contained in Petitioner's memorandum (pp. 18-44) and the Brief of the other Railroads hereinabove referred to (at pp. 14-24), set forth the evidence describing the nature and use of Washington Boulevard. The evidence is overwhelming and uncontradicted that Washington Boulevard has since 1931 been fostered by the City as an arterial major highway and that more of the large cross country trucks which are competitive with the Santa Fe use it than any other east-west street *or highway* in the City of Los Angeles (R. 110-113, 115, 140-141, 144, 145). The commercial and competitive character of Washington Boulevard has been totally ignored by the Commission, even though Petitioner presented a special study upon the subject (Ex. 29 R. H.) and introduced into evidence a traffic count showing that one-fourth of the traffic through the underpasses consists [fol. 194] of large trucks, many of them bearing Interstate Commerce Commission licenses (Exs. 39, 40 and 41 R. H.; R. 498-499).

Much of Petitioner's evidence was introduced to show the Commission the extent to which trucks and automobiles using publicly financed highways have taken away railroad business so that the railroads have long since ceased to expand in proportion to the increases in population (R. 213, 411); that magnificent new six lane highways like Washington Boulevard are built principally for the purpose of expediting an ever-increasing flow of motor vehicles (Ch. 4, Ex. 29 R. H.); nevertheless, the Commission sought to justify its decision upon the finding that "material changes" have taken place in conditions at the present time, as compared to those in 1932, enumerating (1) the great increase in population and (2) the tremendous increase in motor vehicle traffic. In 1932 these same "material changes"—the vehicular public will get the greater benefit—were given by the Commission as justification for requiring a smaller payment from the railroad, viz., 25% (37 C. R. C. 784, 787). The *non sequitur* in the Commission's reasoning is glaringly apparent: Even more

of the same identical "material changes" justifying a smaller payment in 1932 are now made to justify a payment of 50% of the cost! Petitioner's need for having an unbiased Court judge the evidence independently is more pronounced where the changing personnel of the administrative tribunal desert not only the evidence in the case but logic as well.

[fol. 195]

II.

The Commission's Order Is an Arbitrary, Unreasonable and Unconstitutional Exercise of the Police Power.

A. Nature of the Police Power.

In their answers and briefs the Respondents' Public Utilities Commission and City of Los Angeles have sought to justify the order of the Commission apportioning half of the costs of enlarging the railroad bridges over Washington Boulevard to the Santa Fe as a valid exercise of police power, and as *damnum absque injuria*. At page 59 of its opening memorandum of Points and Authorities, Petitioner sought to show briefly the limitations imposed upon the police power. Since Petitioner believes that the fundamental and primary question before the Court is whether or not the Commission's order is a *reasonable* exercise of the *police power* (*Nashville, etc. v. Walters* (1935), 294 U. S. 405, 79 L. Ed. 949), it is essential to inquire searchingly into the basic characteristics of police power and the constitutional limitations thereon. There are set forth below the essential characteristics of the police power involved in this matter.

1. Petitioner is a railroad corporation carrying on its business in California and claims the protection of the Fourteenth Amendment of the United States Constitution and Article I, Sections 13 and 14, of the California Constitution against the application of state authority, delegated to the Public Utilities Commission, the same as an individual claims that protection. A title to land in fee [fol. 196] simple or an easement in land owned by the railroad is a property right protected by both Constitutions.

Connecticut General Life Ins. Co. v. Johnson, 303 U. S. 77, 82 L. Ed. 673, reversing 67 P. 2d 675, 8 Cal. 2d 624 (1937);

Los Angeles Railway Corporation v. Railroad Commission of California, 29 F. 2d 140, aff'd, 280 U. S. 145, 74 L. Ed. 234;

Merced Dredging Co. v. Merced County, 67 Fed. Supp. 598.

2. The due process clause of the Fourteenth Amendment requires that State action shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation *to the object sought to be attained.*

Merced Dredging Co. v. Merced County, supra, p. 606.

3. The police power of the State may not be invoked to satisfy a mere public wish or desire, or demands founded upon aesthetic or sentimental considerations, but only to protect essential public interests.

Merced Dredging Co. v. Merced County, supra, p. 607.

4. The police power may be invoked in derogation of property rights only when founded upon valid and substantial considerations relative to the health, the morals, or the safety of the public. In *Hart v. City of Beverly* [fol. 197] *Hills* (1938), 11 Cal. 2d 343, 345, the Supreme Court stated:

> "By judical determination, evidenced by many legal precedents, the principle of law is thoroughly established, that the constitutional rights of the individual to acquire and to possess property includes the right to dispose of it . . . excepting only in that regard, that the exercise of the police power may be invoked in derogation thereof when it is founded upon valid and substantial considerations relative to the health, the morals, the safety or the 'general welfare' of the public."

At page 346 the Court states:

> "Covering a period of decades, the exercise of the police power was limited to conditions wherein either

the health, the morals, or the safety of the general public was seriously and unquestionably involved. As long as any or either of such requirements were or was respectively maintained, personal liberties were not seriously endangered—but not so, necessarily, upon the advent of the addition of the element of 'general welfare' to those constituents which theretofore solely had constituted a justifiable excuse of warranty for the destruction of natural rights. It is obvious that in its liberal and untrammeled construction, 'general welfare' has an infinite range—nearly, if not as completely beyond the contemplation of the human mind as is the universe itself. * * *

"Thus, if the meaning of the words 'general welfare' be accorded their utmost significance, the original 'due process' protector of human rights may be so endangered by the attacks made thereon by the 'police power' destroyer that considering present legis-
[fol. 198] lative tendencies, within the lives of those now in being, if utter annihilation of the substance of constitutional guaranties do not ensue, no more than a shadow ultimately may remain. * * * But such results may ensue only in the absence of conservative and conscientious judicial construction and interpretation of legislative acts. As hereinbefore has been indicated, it should be noted that the words 'general welfare' have been grafted upon the original stock of 'health, morals and safety,' with the resulting incident that they must be interpreted in accord with the rule that requires that when words of a general character follow those of special meaning the former must be governed in their significance by that which inheres in the latter. Otherwise stated, in the construction of a statute, special words employed wherein are the guiding, if not the controlling force as regards general and succeeding words (citing authorities). With such reversion to legal principles of statutory construction, their application to the instant situation must result in the conclusion that the inclusion of the words 'general welfare' as an element either essential, or which may be relied upon as affording a justification for that

which otherwise properly might be termed a violation of the personal rights of the individual, had the effect only of enlarging or expanding the significance that formerly was deemed properly attachable to the grounds originally deemed necessary to the expedient exercise of the police power of the State."

The opinion requires, therefore, that any legislative act in this state in order to be valid in the face of a challenge on constitutional grounds must bear a reasonable relation to *public health, safety* or *morals*.

[fol. 190] 5. In *Kansas City Southern Ry. Co. v. Kaw Valley Drainage District* (1914), 233 U. S. 75, 58 L. Ed. 857, the Court held that direct interference with and regulation of a subject matter committed by the Constitution to the exclusive control of Congress could not be avoided by the State,

"by simply invoking *the convenient apologetics of the police power*. It repeatedly has been said or implied that a direct interference with commerce among the States could not be justified in this way. 'The state can do nothing which will directly burden or impede the interstate traffic of the company, or impair the usefulness of its facilities for such traffic.' (Citing cases) . . . Furthermore *in the present case it is not pretended that local welfare needs the removal of the defendants' bridges* at the expense of the dominant requirements of commerce with other states, *but merely that it would be helped by raising them*. The fact that the court cannot order them to be raised does not justify a judgment that they be destroyed even in the avowed expectation that what it wants but cannot command is all that will come to pass."

As expressed by Justice Brandeis in *Nashville C. & St. L. R. Co. v. Walters* (1935), 294 U. S. 405, 79 L. Ed. 949, 955:

"A statute valid as to one set of facts may be invalid as to another. A statute valid when enacted may become invalid by change in the conditions to which it is applied. The police power is subject to the constitu-

thereof limitation that it may not be exercised arbitrarily or unreasonably."

[fol. 200] At page 303 the Court further stated:

"The promotion of public convenience will not justify requiring of a railroad, any more than of others, the expenditure of money, unless it can be shown that a duty to provide the particular convenience rests upon it. *Missouri Pacific Ry. v. Nebraska*, 164 U. S. 403; *Missouri Pacific Ry. v. Nebraska*, 217 U. S. 196; *Great Northern Ry. v. Minnesota*, 238 U. S. 340; *Great Northern Ry. v. Cahill*, 253 U. S. 71. These were the authorities relied upon by this Court in *Chicago, St. P., M. & O. Ry. co. Holmberg*, 262 U. S. 162, 167, where it held that *to require a railroad to provide, at its own expense, an underpass, not primarily as a safety measure but for private convenience, was a denial of due process.*

"It is true that the police power embraces regulations designed to promote public convenience or the general welfare, and not merely those in the interest of public health, safety and morals. *Chicago, B. & Q. R. Co. v. Illinois ex rel. Drainage Commissioners*, 200 U. S. 561, 592. And it was stipulated that 'in the light of modern motor vehicular traffic anything which slows up that traffic is an inconvenience. In other words, eliminating a grade crossing, as in the case at bar, facilitates the speed of motor vehicular traffic, in accordance with public demands.' But *when particular individuals are singled out to bear the cost of advancing the public convenience*, THAT IMPOSITION MUST BEAR SOME REASONABLE RELATION TO THE EVILS TO BE REMEDIATED OR THE ADVANTAGES TO BE SECURED. Compare *Hadacheck v. Los Angeles*, 239 U. S. 394; *Miller v. Schoene*, 276 U. S. 272. While moneys raised by general taxation may constitutionally be applied to put-

[fol. 201] poses from which the individual taxed may receive no benefit, and indeed, suffer serious detriment; *St. Louis & Southwestern Ry. v. Nattin*, 277 U. S. 157; 159; *Memphis & Charleston Ry. v. Pace*, 282 U. S. 241, 246; so-called *assessments for public*

improvements built upon particular property owners are ordinarily constitutional only if based on benefits received by them."

6. In *Hooker v. L. A. County Flood Control Dist.* (1944), 25 Cal. 2d 384, 153 P. 2d 950, plaintiff set forth that defendant had removed soils and secure protection adjacent to her land and substituted therefore an unsafe bank resulting in the inundation of her property. Reversing the judgment of dismissal after the lower court sustained a demurrer to the complaint, this Court had the following to say regarding police power (at p. 388):

"Accepting the premise of argument of the parties here that a levee improvement made in the channel of a stream for the general welfare is referable to the police power, the propriety of its exercise must still be considered under the distinct circumstances presented. While the police power is very broad in concept, it is not without restriction in relation to the taking or damaging of property. When it passes beyond proper bounds in its invasion of property rights, it in effect comes within the purview of the law of eminent domain and its exercise requires compensation."

This Court then quoted from *Archer v. City of Los Angeles* (1941), 19 Cal. 2d 19, 119 P. 2d 1 (heretofore [fol. 202] cited and quoted at p. 59 of Petitioner's Memorandum), as follows (p. 388):

"'The state or its subdivisions may take or damage private property without compensation if such action is *essential* to safeguard public health, safety or morals. (Citing authorities.) *In certain circumstances, however, the taking or damaging of private property for such a purpose is not prompted by so great a necessity as to be justified without proper compensation to the owner.* (Citing authorities.) * * *' (Italics added.)"

Continuing at page 320 of the Home case, the Court [illegible]:

"Even there is recognized the inconvertible proposition that the exercise of the police power, though [illegible] attributes of sovereignty for the public welfare and safety is by nature, subject, beyond [illegible] by limitations of the case and be made a cloak [illegible] constitutional rights as to the inviolateness [illegible] property."

Justice Carter's observations in his dissent in *Archer v. City of Los Angeles*, 19 Cal. 2d 19, 28, although involving the flooding of privately owned lands by the Los Angeles Flood Control District, are just as pertinent here:

"The true basis of liability in cases of this character is found in the constitutional provision prohibiting the taking or damaging of private property for a public use without the payment of just compensation. (California [Feb. 1935] Constitution, art. I, sec. 14.) The liability exists independent of negligence on the part of the public agency." (P. 28.)

"Manifestly, the correct test of whether or not the police power has been properly exercised is not and never has been the degree of public necessity. To be appropriate it must be for the public health, safety, morals, or general welfare. If the degree of public necessity be the test then the constitutional guarantee of just compensation for property taken for a public use is completely and forever abrogated. If a legislative body finds that public necessity requires the taking of property for highways, for streets, for a water supply, for recreational areas, for hospitals, for schools or other public buildings, or for a myriad of other public purposes, the courts must accept such a finding as conclusive. If such a finding is all that is necessary to warrant the exercise of the police power, there will be no occasion for the state or other public agency ever paying for any private property taken or damages for a public improvement. Who may say that property for schools, highways, streets, etc., is not absolutely necessary for the proper functioning

of the government? Indeed, it is an indispensable factor in the exercise of the power of eminent domain where compensation is payable, that the public convenience and necessity demand the taking or damaging of any private property involved in the public improvement contemplated. Thus, under the theory advanced in the majority opinion, in any case that the power of eminent domain may be properly exercised, the police power could also be invoked with the result that no compensation would be recovered. Although it is difficult to observe the dividing line between the exercise [fol. 204] of the two powers, it may be justifiably said that police power operates in the field of regulation, except possibly in some cases of public emergency such as a fire where buildings may be destroyed, rather than in the taking or damaging of property for some public improvement. A man may be prevented under the police power from so using or maintaining his property that it is detrimental to the public health, safety, morals or general welfare. Regulations may be invoked to prohibit such use and maintenance. But where neither his property nor its use or maintenance by him has any relation to the public good sought to be accomplished or evil to be remedied, other than that the public desires to use his property, he should be compensated for the taking or damaging of it if the constitutional guarantee still exists." (Pp. 54, 55.)

"I cannot refrain from adverting to the recent but growing tendency of some courts and judges toward the destruction of constitutional guarantees by the process of specious interpretation. It may be that such constitutional guarantees are obnoxious to the social or economic philosophy of the judge or judges deciding the particular cause; but I submit that it is for the people and not the courts to bring about changes in our Constitution. To invoke the police power as a justification for the taking or damaging of private property for public use in violation of section 14 of article I of the Constitution of California is nothing less than amending the Constitution by judicial edict or nullification by sanction of law." (P. 59.)

The *Archer* case was followed in the holding of the California Supreme Court in *Rose v. State of California*, 19 Cal. 2d 713, 123 P. 2d 505. There plaintiff sued to [fol. 205] recover compensation for damages caused through loss of his means of ingress and egress by the construction of a subway or underpass in the center of the street. Defendant contended that the damage, if any, occurred as a result of the exercise of the police power and was therefore damnum absque injuria. In response to defendant's contention, the Court said:

"This contention is wholly without merit as there is no basis for the application of the police power doctrine to the factual situation in this case.

"Generally, it may be said that police power operates in the field of regulation, except possibly in some cases of emergency such as conflagration or flood when private property may be temporarily used or damaged or even destroyed to prevent loss of life or to protect the remaining property of an entire locality. There is obviously no element of regulation involved in the case at bar, and no suggestion of anything in the nature of an emergency. The damage to plaintiffs' property here involved was the result of a public improvement constructed by the state in the exercise of its power of eminent domain.

"While it is true that the seeming absolute protection against the taking or damaging of private property for public use provided for in section 14 of article I of our Constitution may be qualified by the police power in the area in which such power operates, it should be obvious that the police power doctrine cannot be invoked in the taking or damaging of private property in the construction of a public improvement where no emergency exists. To hold otherwise would in effect destroy the protection guaranteed by our [fol. 206] Constitution against the taking or damaging of private property for a public use without compensation. (*Gray v. Reclamation Dist. No. 1500*, 174 Cal. 632 (163 Pac. 1024); *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 260 U. S. 393 (43 S. Ct. 158, 67 L. Ed. 322).)"

2. The next matter to be considered is that no exercise of the police power of the state is constitutional unless it meets the test of reasonableness:

"The power to regulate the use of property or the conduct of a business is, of course, not arbitrary. The restriction must bear a reasonable relation to some legitimate purpose within the purview of the police power."

Ex parte Rodenbeck (1913), 165 Cal. 416, 421, 132 Pac. 554.

On reasonableness as a test, the text writers all agree, e. g., Corpus Juris Secundum, Constitutional Law, Section 195, page 668:

"The police power is subject to the limitation that its exercise must be reasonable and for the public good, . . . the test of the validity of an exercise of the police power is whether it is reasonable."

Corpus Juris Secundum, Constitutional Law, Section 571, page 1163, states:

"The guaranties of due process does not prevent the exercise of the police power, provided such exercise is reasonable and the means selected have a real substantial relation to the object sought to be attained."

[fol. 207] Under this heading, just quoted, the text states (p. 1160):

"Hence, while the guaranty does not interfere with the proper exercise of the police power, and does not prohibit governmental regulation for the public welfare, it of necessity gives way to reasonable police regulations protecting life and property, the due process clause does condition the exercise of the admitted power, by securing that the end shall be accomplished by methods consistent with due process, which demands that it be for a public purpose, that it be not unreasonable, arbitrary, or capricious, which demands only that the law shall not be unreasonable, arbitrary, or capricious, or that the law shall not be unduly op-

promotion, and that the means selected shall have a real substantial relation to the object sought to be attained."

See also:

Nebbia etc. v. Walters (1935), 294 U. S. 405, 79 L. Ed. 940.

3. Most important of all, any reasonable application of the police power is to be tested in the light of present day conditions. In *Wholesale Tobacco Dealers Bu. v. National Candy & T. Co.* (1938), 11 Cal. 2d. 634, 644, 82 P. 2d 3, the Court says:

"The police power has not expanded. Its proper exercise has always been and still is confined to regulation in the public welfare and has always been and still is subject to the standard of reasonableness in its relation to that interest. However, changed social, political and economic conditions have enlarged the field of conduct which may properly be subjected to [fol. 208] regulation in order that the general welfare may be adequately protected. The proper application of the power cannot be measured by past precedents—the test is, of course, present day conditions. These principles have frequently been enunciated by this court and by the Supreme Court of the United States." (Emphasis supplied.)

The bases for Petitioner's charge that the Commission's order is unconstitutional are restated for clarification. Petitioner's property is summarily taken without compensation in the form of benefits received by the proposed construction thus reducing the Santa Fe to the status of a second class citizen in so far as its property rights are concerned. The subject matter within the province of the police power —public health, morals, safety and welfare—has no substantial relation to the "object sought to be attained" which in this proceeding concerns primarily the expediting of vehicular traffic. The imposition of half the costs does not bear a reasonable relation to "the evils to be eradicated or the advantages to be secured." The correct test of whether or not the police power has been properly exercised

is not and never has been the degree of public necessity, much less mere convenience. No emergency exists to justify the taking of property without compensation or in lieu thereof benefits that accrue to Petitioner. Finally, the Commission's purported exercise of the police power is in fact a reversion and retrogression to conditions existing long ago, based upon outmoded precedents and ignores present day conditions and is therefore unreasonable.

[fol. 209] B. The Commission's and the City's Attempts to Justify the Order as Reasonable, Are Based Upon Precedents of a Bygone Era—Not Upon Present Day Conditions.

The Commission's attempt to justify the imposition of costs for enlarging the existing railroad bridges over Washington Boulevard—as reflected by the Commission's orders—depends upon which of three separate orders respecting these same bridges are referred to:

Thus in 1932 the same Commission, but consisting of different personnel, concluded (37 C. R. C. 784) that the Petitioner Santa Fe, should pay 25% of the cost (or one-half as much percentage-wise as the current order) of enlarging the very same structures here under consideration. In the Matter of the Application of the City of Los Angeles for the Widening of the two Existing Grade Separations . . . In connection With the Improvement of Washington Boulevard (37 C. R. C. 785) the Commission in its opinion stated:

> "Washington St., a new major traffic artery extends in a general westerly direction through the city of Los Angeles and merges with Twenty-third Street through the separations involved herein. The present westerly terminus of Washington Street connects with Roosevelt Highway in Santa Monica and the easterly terminus is at Alameda Street, located approximately 4200 feet west of the said grade separations. The city of Los Angeles now proposes to extend Washington Street easterly to connect with Telegraph Road, which is also a major traffic artery . . . The record shows that approximately 30,000 vehicles daily will use Washington Street through the grade separations within a reasonable time after the extension is completed."

[fol. 210] The Commission went on to state that since the recently constructed bridge over the Los Angeles River was 700 feet east of the underpass and was only 56 feet wide that the railroad company should not be required to share in the cost of railroad bridges over Washington Boulevard in excess of 56 feet. Finally the Commission found:

> "There can be no question that the vehicular public will receive the greatest benefit from the widening of these separations, so it logically follows that this class of the public should bear the greater portion of the cost." (P. 787.)

Since there are more vehicles and more traffic congestion now than in 1932, this finding by the Commission is even more pertinent now.

To be noted is the fact that the 1932 opinion in no way discloses what costs were taken into account by the Commission, and whether such costs as drainage ditches and retaining walls were included cannot be determined without going outside of the present record and evidence. The fact remains, although the City's Brief suggests the contrary (p. 3) that 25% of the costs was charged to the Santa Fe in 1932 (37 C. R. C. 784) and 50% in 1952 (51 Cal. P. U. C. 771).

The Petitioner argued then, as is argued now, that the Petitioner will receive no benefit from widening the grade separation structures; that such construction will increase the Petitioner's maintenance costs while the vehicular public will derive the entire benefit. The Commission answered by stating that, "due consideration should be given to the obligations of each party, as well as the benefits [fol. 211] derived" (p. 787). The Commission concluded in 1932 that, "it appears reasonable for The Atchison, Topeka and Santa Fe Railroad Company to bear one-fourth of the cost of constructing said separations."

The second opinion and order issued in 1949 (Appendix F of the Commission's Answer, 49 Cal. P. U. C. 147), doubled the percentage of the cost allocated to the Santa Fe, from 25% to 50% and increased the actual amount Santa Fe would have to pay from $58,466.32 (in 1932)

to $95,160.00 (in 1949). Petitioner fears that the 50% formula adopted in the decision perpetuated on rehearing, could cost the railroads in California scores of millions of dollars during the next few years.

The only justification to be found in the 1949 opinion for such increase is the following:

> "As pointed out by applicant in its closing brief, we cannot now fail to take note of the material change in conditions at the present time as compared to those in 1932, at the time of Decision No. 25069, *supra*. The great increase in population and the tremendous increase in motor vehicle traffic present a new problem.
>
> "According to the evidence presented, the widening of the underpass is now necessitated by the increase in vehicular and pedestrian traffic."

The 1949 opinion also pointed out that the vicinity of the underpasses has become one of the leading industrial sections; that there is a large amount of truck traffic; and that the height of the existing bridges is insufficient for tall commercial vehicles.

Then the Commission stated forthrightly that:

> "We must take cognizance of present-day conditions, and in this particular instance we are impressed [fol. 212] not only by the fact that the need for the proposed improvements is not brought about by any requirement of the railroad, but also by the fact that, but for the existence of the railroad, at the location of the proposed street widening and the grade separation structures now there, the city would be able to widen its street without the necessity of incurring the cost of replacing the existing bridge and underpass structures with the new structures proposed."

The Commission approved language in another case to the effect that direct financial benefits is not the sole test to be used in determining how much the railroad should pay, but due consideration should be given to the obligations of each party as well as benefits received—"We believe that the railroad has a continuing obligation to participate in the cost . . ."

Although in 1949 the same size bridge was authorized for the "public convenience and necessity" as was authorized in 1932, the Commission's opinion does not tell us how or why the Santa Fe's "obligation" or benefit was doubled nor does it justify the doubling of the percentage of costs assessed against the Santa Fe.

The third decision (51 Cal. P. U. C. 771), dated June 24, 1952, to which Santa Fe's Petition for a Writ of Review is addressed, increased the share to be paid by Santa Fe to 50% of $569,355.00 or $284,677.50. Gone was the allowance made in the 1949 order excusing the Santa Fe from participating in the cost of 20 feet of the new structures replacing the 20 foot long existing structures, and gone was the requirement that the City alone pay the expense of bridges wider than 56 feet.

[fol. 213] Disregarding recitals of evidence, the Commission in 1952 found:

1. That there is a need for widening and increasing the heights of the existing underpasses.

2. That the divided span bridges consisting of space for two 33 foot roadways and two 7 foot sidewalks would best meet the public safety, convenience and necessity.

3. That the Commission has authority pursuant to Public Utilities Code, Section 1202, to allocate costs.

4. That its authority is an exercise of the police power.

5. That under the exercise of the police power the Commission may require grade separations and may apportion costs "in the exercise of its sound discretion" (p. 781).

6. That material changes have taken place in conditions at the present time as compared to those in 1932—the great increase in population and the tremendous increase in motor vehicle traffic present a new problem.

7. That the proposed widening of Washington Boulevard is to meet local transportation needs.

8. That the City's contribution must come entirely from local funds.

9. That the improvement is "not without benefits to the railroad" because it can operate longer trains without delays and without hazard of grade crossing accidents and the new structures would replace bridges that are 75% depreciated.

[fol. 214] 10. That it is in the public interest to authorize the widening and increasing of the height of the existing underpasses.

11. That the Santa Fe shall pay 50% of $569,255.00.

There is no attempt made in the answers and briefs of the Commission and of the City to justify the decision on the basis of reasonability or equity and any attempt to do so would be transparent under the circumstances.

The Commission's argument is founded instead upon authorities which are for the most part of World War I vintage and the era of the Model T. The Commission asserts that it is not bound by any statutory requirement but may assess costs in its "discretion"; thus that there is no guide but the good faith and personal convictions of changing personnel of the individual commissioners who in 1962 decided that Petitioner should pay twice as much percentagewise and four times as much in dollars as was required twenty years ago when the same Commission but different personnel, exercising the same police power, decided exactly the same issues differently.

The Commission attempts to distinguish the only pronouncement of the United States Supreme Court on the cost apportionment problem issued in the past 17 years (*Nashville C. and St. L. Ry. v. Walters* (1935), 294 U. S. 405, 79 L. Ed. 949), and they must attempt to distinguish it because this latest decision takes account of the changed conditions resulting from the tremendous increase in volume and importance of highways and vehicle traffic and strikes down as arbitrary legislation placing on the railroad half the cost of a grade separation.

[fol. 215] The Commission does argue that it now presents to the Supreme Court a *fait accompli* and says that it must be accepted.

One looks in vain through the pages of the Commission's brief for any attempt to justify the decision on any basis of reasonableness under the factual conditions of need for the improvement or benefit to be received by the parties in interest today. Repeated by the Commission is the charge that Santa Fe "rebels," "revolts" or would "overthrow" the regulatory statutes (P. U. C. Br. pp.

35 and 37). Petitioner reaffirms its stated position that the railroads and highways must co-exist in today's world and that it does not rebel nor is it repelled by the thought of paying a reasonable sum based upon the benefits to be achieved by enlarging the existing bridges. Petitioner believes that a reasonable sum can only be judged by the benefit basis of assessing costs and that the benefit basis is synonymous with reason and equity under present day conditions. Petitioner does object to paying a large percentage of the costs of an ambitious and expensive project having a minimal relation to safety and a maximal relation to public convenience (avoidance of delay).

The City's Argument.

The City presents much the same matters as the Public Utilities Commission. Points IV and V of the City's Brief (pp. 35 and 47) touches upon the equities in the situation. Point IV excuses the view that there is no logical basis for the benefit method of assessing costs, but here again the reliance is upon cases at least 15 years old which in turn rely upon decisions published 35 years ago and which, even Petitioner believes did substantial justice under the circumstances existing in that day. The [fol. 216] City stoutly asserts that the railroad's obligation is much greater *per se* because city streets are involved (p. 46), and also when local transportation needs are involved and the City must spend its own money for the improvements (p. 42).

But here the so-called city street is a major arterial highway rendered to act as a feeder to freeways and to decrease the traffic load from parallel state and federal highways and is the principal east-west truck route in the City (1948 R. 19, 31; R. 81, 110-113, 115, 140, 144, 145). Whether the City spends its own money or money allotted from gas tax funds and fees obviously does not broaden the police power. In any event such funds all come from the same source, the public taxpayer. Moreover, in the long run even the city street which is *not* built as an arterial way takes its place in the national system of highway transportation.

The City's principle attempt at logic and reason is

found in Point V, page 47: In this point the City's argument is entirely hypothetical. The City assumes the grades are not separated now; that the railroad is given a right of way over vehicular traffic which must stop when a train goes by; that accountants and mathematicians cannot calculate the value of benefits to the diverse parties to be received from grade crossings separations; that the City has exclusive property rights by virtue of an easement for street purposes to be free from any interference between rail and automotive traffic at crossings and that the railroad has, apparently, no property or constitutional rights in the matter at all; that the railroad has some undefined legal obligation inherent in the situation over and beyond the requirements of a valid and constitutional exercise of [fol. 217] the police power; that if there were a grade crossing, instead of separated grades, the Santa Fe could run longer trains, grade crossing accidents would be eliminated and the railroad would consequently benefit from good will from fewer accidents and from avoiding delay to motorists. In this way the Commission completely ignores the evidence—the existence of the separations now in place; that there is now no conflict or interference between a train and a vehicle; and that the City commencing in 1931 changed quiet streets and paper streets into a major highway.

The only non-hypothetical argument contained in the City's Brief is that the Santa Fe will benefit because it will possess brand new bridges. The undisputed evidence is that the present bridges are adequate for the foreseeable future (R. 474, 493, 522); that the new larger bridges will cost more to maintain than the existing bridges; and that trains using them are operating within yard limits and restricted to a maximum of 15 miles per hour (R. 480). In any event it would cost less to replace 20 foot bridges if and when the existing bridges must be rebuilt than to build elaborate structures for a six lane highway.

In its conclusion (P. U. C. Br. p. 60) the City expresses the opinion that the railroad should pay all the cost made necessary by its presence and attempts to justify its position because such a "formula" can be made mathematically exact in every case. This argument is answered hereafter in Section VI.

In its brief the City ignores the impact of competitive highway transportation upon the railroad industry and the many related factors upon which so much evidence was introduced. Equitable considerations are not even discussed, because there is no equity in the City's position. [fol. 218] Just as this Court stated in *Wholesale Tobacco Dealers Bu. v. National Candy & T. Co.* (1938), 11 Cal. 2d 634, 644, 82 P. 2d 3 (emphasis added), "*The proper application of the* (police) *power cannot be measured by past precedents—the test is of course present day conditions*" —This doctrine was recognized in the *Nashville* case and is equally applicable here.

Nevertheless great reliance was placed by the Commission and by the City upon a series of cases decided by the United States Supreme Court many years ago. These cases are:

Erie Railroad Company v. Board of Public Utility Commissioners (1920), 254 U. S. 394, 65 L. Ed. 322;

Chicago, Milwaukee and Saint Paul Railroad Company v. Minneapolis (1914), 232 U. S. 430, 58 L. Ed. 671;

Missouri Pacific Railway Company v. Omaha (1914), 235 U. S. 121, 59 L. Ed. 157;

Lehigh Valley Railroad Company v. Board of Public Utility Commissioners (1928), 278 U. S. 24, 73 L. Ed. 161.

Each of these antedate the *Nashville* case, *supra*, which was decided March 4, 1935. Moreover, through each of the cases runs a single consistent thread—the factor of safety as the motivating force requiring the separation of grades and as justifying the imposition of costs upon the railroad. Delay to automotive traffic, increased speeds of automotive traffic, density of population especially in our urban areas, a tremendous volume of vehicular traffic, the problems incident to the expansion of commercial highway carriers, etc., were embryo problems in 1914 when the [fol. 219] *Minneapolis* case and the *Missouri Pacific* case were decided. For instance in the *Minneapolis* case Justice Hughes in delivering the opinion of the Court (which approved a state court decision refusing to allow the

railroad compensation for the cost of a railroad bridge across the gap in its right of way made by the building of a canal) quoted cases using the following language:

> ". . . the right to exercise the police power is a continuing one; that it cannot be contracted away, and that a requirement that a company or individual comply with reasonable police regulations without compensation is the legitimate exercise of the power . . ."

and on the same page:

> "The railway company accepted its franchise from the state, subject necessarily to the condition that it would conform at its own expense to any regulations, not arbitrary in their character, as to the opening or use of streets, which had for their object the safety of the public, or the promotion of the public convenience . . ." (L. Ed. p. 675.)

In the *Missouri Pacific* case, *supra*, the Court affirmed a decision requiring the railroad to separate a grade crossing in a city at its own expense by building a viaduct. The railroad claimed the protection of the due process clause of the Fourteenth Amendment. The Supreme Court used the following language:

> "This is done in the exercise of the police power, and the means to be employed to promote the public safety are primarily in the judgment of the legislative branch of the government, to whose authority such matters are committed, and *so long as the means* [fol. 220] *have a substantial relation to the purpose to be accomplished*, and there is no arbitrary interference with private rights, the courts cannot interfere with the exercise of the power by enjoining regulations made in the interest of public safety which the legislature has duly enacted." (L. Ed. p. 160.)
>
> "The broad authority to require any Railroad Co. to make such improvement, in the interest of public safety, is conferred by the legislature upon the city. The safety of the traveling public is the primary con-

sideration, and this is accomplished by the construction of the viaduct . . ." (L. Ed. p. 161.)

In the *Erie* case decided in 1920, the Court speaking through Justice Holmes, in sustaining an order of a state administrative tribunal which imposed the cost of abolishing certain grade crossings upon the railroad, depended upon a reasonable exercise of police power and emphasized safety factors in upholding the order. He stated:

> "the State . . . has a constitutional right to insist that they (railroad-highway crossings) shall not be made dangerous to the public, whatever may be the cost to the parties introducing the danger. That is one of the most obvious cases of the police power, or, to put the same proposition in another form, the authority of the railroads to project their moving masses across thoroughfares must be taken to be subject to the implied limitation that it may be cut down whenever and so far as the safety of the public requires . . . If it reasonably can be said that safety requires the change it is for them (the states) to say whether they will insist upon it. . . . To engage in interstate com- [fol. 221] merce the railroad must get on to the land and to get on to it must comply with the conditions imposed by the state for the safety of its citizens."

The Court also said (at p. 412):

> ". . . If we could see that the evidence plainly did not warrant a finding that the particular crossings were dangerous there might be room for the argument that the order was so unreasonable as to be void. The number of accidents shown was small and if we went upon that alone we well might hesitate. But the situation is one that always is dangerous. The board must be supposed to have known the locality and to have had an advantage similar to that of a judge who sees and hears the witnesses. The courts of the state have confirmed its judgment. The tribunals were not bound to await a collision that might cost the road a sum comparable to the cost of the change. If they were reasonably warranted in their conclusion their judgment must stand." (L. Ed. 333.)

The Commission also quotes from the *Erie* case (P. U. C. Br. p. 22), to the effect that the state has a right to insist that a railroad crossing shall not be made dangerous to the public, "*whatever may be the cost to the parties introducing the danger.*" The underpasses everyone admits were completely adequate when constructed. It was only when the City opened Washington Boulevard as an arterial highway that they became inadequate and the only danger existing today—that of vehicles running into the abutments—arose when the City, not the railroad, introduced a huge volume of traffic and the character of [fol. 222] traffic itself changed by the introduction of higher, wider, faster and more dangerous vehicles.

The same emphasis upon safety considerations in the reasonable application of police power to eliminate danger at grade crossings was made by Justice Taft in the *Lehigh Valley R. Co.* case, *supra*, decided 24 years ago, in 1928.

Other cases cited by the Commission and the City likewise stress the factor of safety and with but two exceptions were decided before the *Nashville* case (City's Br. pp. 30, 38 and 43). In *Lehigh & N. E. R. Co. v. Public Service Commission* (1937, Pa. Sup. Ct.), 191 Atl. 380, the Court did not even discuss the many changed circumstances and conditions noted in the *Nashville* case, but summarily distinguished the case on the ground a statute was there involved rather than an order imposed in administrative discretion (Op. p. 383). The case of *State ex rel. Alton R. Co. v. Public Service Commission* (Mo. 1934), 70 S. W. 2d 55, preceded the *Nashville* case and can hardly be deemed persuasive now.

The case of *Lyford v. State of New York* (1940), 140 F. 2d 840, cited by the City at page 43 in its brief, was decided under the national bankruptcy statutes and applied a New York statute passed in 1926. The Court relies on the *Erie* case, *supra*, decided in 1914 and there is entirely wanting any clue that the *Nashville* case was even mentioned to the Court! Although this case was decided in 1944, the 1926 New York statute (McKinney's Unconsolidated Laws, Secs. 7903, 8052) required the railroad to [fol. 223] pay half the cost of grade separation construction. In 1939 the New York statutes were amended to

provide that the portion of cost to be borne by the railroads for crossing elimination construction begun after 1938 would be limited to benefits derived by the railroads but not to exceed 15% of the project cost; that the railroads' share would be nothing on State throughways and arterial routes in cities (McKinney's Unconsolidated Laws, 1939, Secs. 9051 to 9063—authorized by Art. 7, Sec 14, New York Constitution, adopted 1938). Thus if the instant case were presented in New York today the railroad would be charged nothing at all. It is with some surprise, therefore, to see the City referring to the *Lyford* case as an expression in New York of the reasonable application of police power (see Ex. 29, R.H. p. 72 for other states which have in recent years limited the amount to be contributed by the railroads).

Further, the above New York decision should be read in the light of later decisions:

In *Elimination of Existing Highway-Railroad Crossing at Spencer, Tioga County* (1938), 5 N. Y. S. 2d 946 (948-950), 254 App. Div. 412, the Court summarized the railroad's position as follows:

> "The argument of the appellant is that the promotion of safety is no longer the main purpose of grade crossing elimination, but that the emphasis has changed so that the main purpose now is the furtherance of an uninterrupted rapid movement by motor vehicles irrespective of the question whether public safety requires such improvement."

[fol. 224] and held:

> "Furthermore, the imposition of such financial burden upon the railroad must bear some reasonable relation to the evils to be eradicated or the advantages to be secured; *it is not sufficient to justify the imposition of such financial burden* upon the railroad *to show that public convenience will be promoted*, but *there must be some reasonable relation between the improvement and the promotion of public safety. Nashville, C. & St. L. Ry. v. Walters, supra.*
>
> "Appellant should be permitted to show the facts alleged in its application for a rehearing, not only as

> to its unfavorable financial condition as revealed by actual experience since the last hearing, but that the elimination places an unreasonable financial burden upon the railroad, because it is not primarily in the interest of safety, but simply for the convenience of the traveling public, or for other reasons not related to the problem of safety."

As showing the acceptance of the benefit principle from the public standpoint, we call attention to *Existing Highway-Railroad Crossings, etc.* (1937), 295 N. Y. Supp. 831, 837, 251 App. Div. 72, wherein the Court said:

> "Neither should the public be compelled to share in an expense which is out of all proportion to the benefit to be derived from the improvement."

A somewhat similar principle was followed in *Austin v. Shaw* (N. C., 1952), 71 S. E. 2d 25.

[fol. 225]

III.

The Nashville Case.

Nashville, Chattanooga & St. Louis Railway v. Walters (1935), 294 U. S. 405, 79 L. Ed. 949.

Both the Commission and the City make a great effort to distinguish this case from the Washington Boulevard situation, as well they must since the *Nashville* case is a forceful presentation of the changing equities in the revolution in the transportation problem and in the incidental grade crossing problem. The Commission sets forth these points of claimed distinction (P. U. C. Br. p. 12):

1. In the *Nashville* case a statute was involved but in our case the Commission has discretion to allocate costs and does not purport to make an arbitrary assessment.

Whether the assessment is arbitrary depends upon the surrounding circumstances and conditions. In any given case the Commission's "discretion" may be exercised just as arbitrarily as Tennessee's 50% statute.

2. The *Nashville* case is based upon special facts and the railroad conceded that in a case such as Washington Boule-

yard the railroad could be required to pay the entire cost (P. U. C. Br. p. 13).

At L. Ed. p. 954 the railroad conceded the rule established by the early cases—a long way from even mentioning the special facts in existence in the Washington Boulevard situation!

3. The United States Supreme Court decided only that the Supreme Court of Tennessee erred when it refused to consider the special facts in the case.

In the *Nashville* case the Supreme Court of Tennessee forthrightly held that it declined to consider the facts re-[fol. 226] lied upon by the railroad. In our case the Commission exercised procedural due process to the extent of listening to the railroad's evidence and then proceeded to ignore the special facts presented and to make findings contrary to the evidence, all of which has been pointed out elsewhere in this brief and Petitioner's memorandum.

3(a). (Following the chronological designation used in P. U. C. Br. p. 13). That in the *Nashville* case the underpass was part of a state-wide and nation-wide plan to foster commerce by motor vehicle.

In our case, regardless of what the planners may have in mind, the effect is the same as in the *Nashville* case. Washington Boulevard is being widened and improved as a feeder into freeways (1948, R. 21, 29, 30 and 47) and to relieve traffic now using Olympic Boulevard, State Highway No. 26, which connects with U. S. Highway No. 101. The City's own witnesses referred to Washington Boulevard as a major highway (R. 561), as a major east-west artery continuous across the city and county (R. 533); and it is shown on the master plan of highways as a major highway (1948, R. 80). The traffic on Washington as previously mentioned is approximately one fourth truck traffic, much of which by actual count consists of the large cross country variety bearing Interstate Commerce Commission licenses. Already, before the bridges are enlarged it is the most heavily traveled route for trucks east and west in the City and more of the large trucks will use it if the bridges are enlarged (R. 145). The end result is an improved and important link in the chain of state and federal highways across the nation helping to enhance the steady

trend of traffic of all kinds from the railroads to commercial motor vehicles.

[fol. 227] 3(b and c). The decision to build the underpass in the *Nashville* case was not in any proper sense an exercise of the police power but a plan for a nation-wide system of super-highways in active competition with the railroads.

This point duplicates to some extent 3(a) above. Note that the trial court in the *Nashville* case really said that the police power was no more involved in connection with building the underpass than with elimination of curves, grades, widening of the pavement etc. (L. Ed. p. 956).

3(d and e). Relief of unemployment was the main incentive for building the highway.

Regardless of motivation, the victim of a grade crossing collision is just as hurt on a depression built highway as on any other, and the police power is just as applicable to one as to the other. Safety factors are just as applicable whether the highway be a federal aid highway or an arterial city street. Without the latter the federal aid highway out in the country would be rather useless, since the truck must come to town on a city street. Washington Boulevard as a link in the national system of highways is, with Alameda Boulevard, a few hundred feet west of the underpasses, the focal point of truck traffic and the center of gravity of such traffic to and from the industrial district and to Los Angeles harbor (1948, R. 89).

3(f and g). (P. U. C. Br. p. 14.) In the *Nashville* case the existing highway was considered safe and adequate [fol. 228] by the City authorities and after the new highway was built the nearby grade crossing would remain.

In our case no train and motor vehicle can possibly collide for there is no grade crossing. The existent situation was entirely adequate to take care of the garbage trucks for which the underpasses were originally built. We have there therefore a situation in which the City is like a camel that stuck its head in the tent. In 1914 the grade was separated for the sole purpose of providing access for the City's garbage trucks into the area east of the underpasses. In 1931 the City commenced the opening of Washington Boulevard as an arterial highway and the camel

got its head into the tent by virtue of an order of the Public Utilities Commission requiring the railroad to pay 25% of the cost of bridges 56 feet wide. For reasons not stated in the record, the City did not build the bridges authorized in 1932. By 1948 the City wanted railroad overpass bridges wide enough to accommodate six lanes of vehicular traffic instead of four, and with the current order of the Commission the camel has taken possession of the tent.

The Commission again alludes to "local traffic needs." Upon analysis this terminology is rather elusive and can mean many things. Washington Boulevard is local in the geographical sense and it unquestionably carries traffic that travels only short distances, or local traffic. But in drawing a distinction between Washington Boulevard and the highway in the *Nashville* case the importance of Washington Boulevard as a right of way for traffic competitive with the railroad should hardly be ignored.

[fol. 229] 3(i). (P. U. C. Br. p. 15.) Federal funds were to help pay for the underpass and the underpass was to be built in order to qualify for such funds, not to meet local traffic needs.

The matter of source of funds has already been discussed above, as has the matter of local vs. long haul traffic. Of course, the federal authority in making the construction of underpasses a condition upon which funds would be advanced approved such construction "as being a proper engineering feature in the construction of a nation-wide system of highways for high speed motor vehicle transportation" (L. Ed. 961).

4. The Commission states that no new route is being established (P. U. C. Br. p. 16).

Such a statement shows a short memory. Before 1931 the underpasses were used only by the City's garbage trucks. In that year the bridge over the Los Angeles River a short distance east was opened and the underpasses were opened to public travel. A new route was certainly established then. Progressively Washington Boulevard has been widened and improved to a six lane arterial route which differs from a freeway only in that it is not a limited access highway. A slow traffic, narrow street changed over the

period of a few years to a six lane artery from the ocean to east of the City is a new through route.

The City Brief (p. 40) adds other alleged distinguishing features:

[fol. 230] 1. That Washington Boulevard was not designed as part of a nation-wide system of highways and does not parellel the railroad.

Nevertheless, Washington Boulevard is being improved by the instant proposal to relieve some of the traffic congestion on Olympic Boulevard, a State highway which parallels Washington Boulevard a short distance north. That the commercial users of highways do not necessarily follow the markers designating state and federal highways is demonstrated by the use the trucks make of Washington Boulevard. It is the natural route for such traffic, from the center of gravity as Mr. Dorsey, the City's witness, called it. Because of its popularity with the commercial highway carriers it is the classic example of a highway system competitive with Petitioner.

2. The City states that in the *Nashville* case the railroad was to pay half the cost directly and a portion of the other half indirectly, a portion by federal aid and "only a very small portion" by the truck and bus owners.

The only difference here is that there is no federal contribution. Manifestly the Santa Fe pays tremendous property taxes on its privately owned right of way. Whether these funds are spent on schools or highways is under public control. In addition to the direct charge of half the cost the railroad would have larger bridges to maintain at increased cost of maintenance. The "indirect costs" are so high that including the cost of taxes the railroads pay 23 cents of their gross revenue dollar for the ownership and maintenance of their rights of way while the motor vehicle [fol. 231] commercial beneficiaries of a new improved Washington Boulevard pay only 3.7% of their gross revenue dollar for their public built, railroad subsidized highway rights of way (Ex. 29 R. H.; R. 204). This is discrimination where it hurts, an exaction from the railroads for the benefit of their competitors. Some place along the way discrimination becomes unconstitutional. Petitioner fervently believes the time is now.

There are points of similiarity between the special facts

in the *Nashville* case and the special facts in our case, none of which are mentioned by either the Commission or the City:

1. Revolutionary changes incident to transportation wrought in recent years by the widespread introduction of motor vehicles (L. Ed. p. 956).

2. The assumption of the Federal Government of the functions of road builder—so that city streets, particularly arterial truck routes, connect with a nation-wide competitive highway transportation system.

3. The resulting depletion of rail revenues, obscured in recent years by temporary war traffic.

4. The change in the character, the construction and the use of highways.

5. The change in the occasion and purpose for elimination of grade crossings, which is now uninterrupted and unimpeded traffic flow, and in the chief beneficiaries thereof, which is the traveling vehicular public.

6. The change in the relative responsibility of the railroads and vehicles moving on the highways as elements of danger and causes of accidents; *e. g.*, large, faster, [fol. 232] dangerously laden vehicles which cause damage to railroads.

7. The main purpose (the object sought to be attained) of grade separation is now the elimination of delay and the furtherance of uninterrupted, rapid movement by motor vehicles (L. Ed. p. 959).

8. The railroad has ceased to be the prime instrument of danger and the main cause of accidents.

9. Before the system of federal-aid highways were built on a county level and served, in the main, local traffic. Long distance traffic was served almost wholly by the railroads and water lines. Under such conditions the occasion for separating grades was mainly the danger incident to rail operations and promotion of safety was the main purpose of grade separation (L. Ed. p. 960).

10. During the system of county roads, the need for eliminating existing crossings, and the need for new highways free from grade crossings, arose usually from the growth of the community which was mainly the result of the transportation system offered through the railroad and the highways were then feeders of rail traffic so that com-

munity growth *and highway improvement* benefited the railroad (L. Ed. p. 960).

Los Angeles is the largest city that has grown up since the coming of the motor vehicle. It is truly a decentralized city that grew with the motor vehicle; the City with its satellites is fully served by motor vehicle. It is recognized as a city that grew not around railroads, but with motor vehicles as a basis for its widespread economy. The motor vehicle has been responsible not only for its growth, but also for its congestion which is typical of all of California. [fol. 233] 11. Federal-aid highways are not feeders of rail traffic but deplete rail traffic and intensify motor competition. Likewise a six laned Washington Boulevard is not a feeder of rail traffic but inures primarily to the benefit of the suburbanite and competitive motor traffic. The wagon road and the road for local truck traffic were true access highways. The fine arterial streets and highways just intensify competition; otherwise railroad business would have kept pace with the expansion of streets and highways and the growth in population.

12. Avoidance of traffic interruptions incident to crossings at grade are now of far greater importance to the highway user than to the railroad (L. Ed. p. 960).

13. The grade crossing in the *Nashville* case was not dangerous as attested by the occurrence of only two minor accidents in ten years and these were settled for only $50.00. The crossing was protected by the most modern electrical device. In our case there is no grade crossing and the railroad has paid nothing on account of grade crossing accidents because there has never been even one. Nor has a single cent ever been paid on account of any collision with the abutments of the bridge.

14. Practically all vehicles using the new highway in the *Nashville* case would compete for traffic with the railway—buses, trucks, some of them 70 feet in length and with a load as much as 50,000 pounds would compete for the most profitable classes of freight thus reducing the volume of traffic and compelling reduction in rates. The same is true in the Washington Boulevard case except for the com- [fol. 234] muters and suburbanites. The short haul traffic is practically all lost from the rails, and most of the intrastate business is hauled by truck. Now the competition is

keen for even the long haul freight and particularly for the premium classes of freight (R. 368).

15. While the railway, the sufferer from the construction of new highways, is burdened with one-half the cost of the underpass, the owners of trucks and buses and others who are beneficiaries are immune from making any direct contribution. The Court stated that nearly 28 per cent of the gross revenues of the railway were required to pay the state and local taxes and maintain the roadway, acquired and constructed at its own expense; while, the commercial motor carriers in Tennessee paid in state and local taxes not more than 7 per cent of their gross revenue for use of the highways (L. Ed. p. 962).

Petitioner relies upon the *Nashville* case in the belief that no fair appraisal of reasonableness in the exercise of police power can here be made without reviewing the Commission's order in the light of changed conditions noted in Justice Brandeis' opinion and without cognizance of the fact that these changed conditions are more pronounced now than they were at the time the *Nashville* case was decided.

Lastly, the *Nashville* case is the most recent pronouncement of the Supreme Court of the United States upon the subject.

[fol. 235] IV.

The Benefit Basis for Apportioning Costs Is Synonymous With a Reasonable Exercise of the Police Power for the Health and Safety of the Public, and Its Application Is a Practical Solution in This Matter.

This is the unusual and perhaps the exceptional case in which the railroad can, with reason and justice, contend that it will not be benefited, and that it should be assessed no part of the costs. This case involves the expansion of a street not in existence before 1931 into an important major arterial highway, which just coincidentally happens to be the principal east-west commercial route competitive with the railroad. The grade has already been separated, so that enlarging the present 20-foot wide underpasses to a six-lane highway is very little different in principle from a situation that would exist if the City were constructing a new freeway or arterial highway under Petitioner's

tracks. The finding of the Commission that Washington Boulevard is to be widened for local traffic needs, wholly disregards the evidence and is a finding actually contrary to any fair appraisal of the evidence.

In the usual situation the grade separation construction results in the closing of the grade crossing. In *Southern Pacific Company v. Public Utilities Commission*, S. F. No. 18704, also pending upon a Petition for a Writ of Review, the usual situation is presented. This case involves the construction of a grade separation at Los Feliz Boulevard [fol. 236] in the City of Glendale, in which the Commission ordered the Southern Pacific Company to pay 50% of an elaborate structure costing $1,493,200.00. The Southern Pacific Company offered to pay the amount which represented benefits to be received by the railroad, and introduced uncontradicted evidence of the value of benefits to the railroad. Likewise in the Washington Boulevard case the Santa Fe will willingly pay any reasonably apportioned expenses on a benefit basis, if there are such benefits. The record, up to the present time, fails to show any benefit will accruo to Petitioner.

But the City states that benefits cannot be figured with any degree of certainty. The undisputed evidence is to the contrary. Thus, Chapter 8, page 68, of Exhibit 29 R. H. sets forth numerous instances where benefits have been analyzed and calculated. This study reflects the interest shown in the problem in other states and was prepared by Arthur C. Jenkins, who for 11 years was an engineer employed by the Public Utilities Commission, trained in the factors presented by the cost apportionment problem. For ready reference Chapter VIII is set forth herein:

Benefits to Railroads From Grade Crossing Separations.

NATURE OF BENEFITS.

It can be stipulated that when the two streams of traffic are separated by construction of a highway-railroad grade crossing at different grades, there will be physical benefits derived by both the railroad and users of the highway. [fol. 237] The accident hazard will be eliminated and delays to both rail and highway traffic will be avoided. Economically the existence of benefit is not so conclusively evident. The question is whether the end justifies the means

and if it does, who should carry the financial burden. If the burden is to be divided, then what are the relative benefits accruing to principal parties.

There appears to be a considerable lack of understanding as to the extent to which the railroad will be benefited, the general assumption being that its measure of value is high and approaches justification for a so-called fifty-fifty proportion of cost allocation.

In the interest of clarifying this point, much work has been done in different sections of the country in developing detailed analyses to show the actual facts as related to specific railroads in some of those states where legislation on the subject was under consideration.

Benefit Analysis in Michigan.

In the State of Michigan an analysis was made of grade crossing elimination costs experienced by eight Class I railroads for the period from 1925 to 1945, inclusive. The purpose was to ascertain the difference between the annual costs of maintenance, protection, and accidents at those crossings before separation of grades for comparison with the annual cost after separation.

The study covered 153 projects which eliminated 167 crossings at grade, 103 by underpasses, 49 by overheads [fol. 238] and 15 by closings and diversions. The results were as follows:

Total Costs of Projects		$32,228,895
Average Cost Per Project		192,987
Annual Cost Prior to Separation:		
Maintenance and Protection	$169,070	
Average Annual Cost of Accidents	14,177	
Total Annual Cost		$ 183,247
Annual Cost After Separation:		
Maintenance and Renewal of Portions of Structures Maintained by Railroads		123,724
Net Annual Saving		$ 59,523

This net annual saving capitalized at 5% represents $1,190,000.00, or 3.69% of the total cost of the eliminations and indicates a fair measurement of the benefit derived by the railroads as being approximately 4 per cent.

Benefit Analysis in West Virginia.

The same procedure as described above for Michigan was followed in connection with the railroads of West Virginia covering the period from 1926 to 1945, inclusive, including 112 projects. In the aggregate, 153 grade cross-[fol. 239] ings were eliminated, 24 by underpasses, 35 by overheads and 94 by diversions and closings. The results were as follows:

Total Cost of Projects		$11,498,888
Average Cost Per Project		75,156
Annual Cost Prior to Separation:		
Maintenance and Protection	$35,503	
Average Annual Cost of Accidents	5,897	
Total Annual Cost		$ 41,400
Annual Cost After Separation:		
Maintenance and Renewal of Portions of Structures Maintained by Railroads		43,902
Net Increased Cost After Separation		$ 2,502

On this set of projects there was no benefit to the railroads, but actually an increase in cost.

Benefit Analysis in Indiana.

Similar studies were conducted relative to railroads in the State of Indiana, covering 148 projects constructed during the period from 1926 to 1941, inclusive. There were 110 grade crossings eliminated, 63 by underpasses, 76 by

[fol. 240] overheads and nine by diversion and closings. Results of the analysis were as follows:

Total Cost of Projects		$16,891,090
Average Cost Per Project		153,555
Annual Cost Prior to Separation:		
Maintenance and Protection	$71,771	
Average Annual Cost of Accidents	17,561	
Total Annual Cost		$ 89,332
Annual Cost After Separation:		
Maintenance and Renewal of Portions of Structures Maintained by Railroads		55,529
NET ANNUAL SAVING		$ 33,803

This amount capitalized at 5% represents $676,000.00, or approximately 4% of the total cost of the eliminations.

BENEFIT ANALYSIS IN OTHER STATES.

Similar studies were made in other states and the capitalized annual savings resulted in percentage of total costs as follows:

State	*Railroads*	*Year*	*Per Cent*
Ohio	NYC and Erie	1939	9.58
Illinois	21 Class 1 Roads	1939	2.32
New York	Class 1	1940	Deficit

[fol. 241] BENEFIT ANALYSIS IN CALIFORNIA.

In connection with a proposal of the State of California, Department of Public Works, Division of Highways, to construct a grade separation between state highway and main line track of Southern Pacific Railroad Company near Goshen in California, request was filed with the Railroad Commission of the State of California (now the Public Utilities Commission), under Application Nos. 18024 and

19101. By its Decision No. 25651, dated January 16, 1933 (38CRC386), the Commission authorized the separation and allocated costs of construction on a benefit basis, which is described by the following excerpt from the decision.

> "After carefully considering all the evidence in these proceedings, it is concluded that . . . the order should . . . fix the amount to be contributed by the railroad in a lump sum based upon direct and indirect benefits. This sum is arrived at by capitalizing an amount measuring the annual benefits and privileges on a 6 per cent basis."

Upon that basis the railroad was assessed $15,000.00 only, out of a total cost for construction of $343,000.00. The determination of amount was derived from a cost analysis submitted by the railroad substantially patterned along the lines of the various analyses cited above for other states.

In commenting upon its action in that proceeding, the Commission stated in its Opinion (38CRC386):

[fol. 242] "In allocating the costs here we are departing from the practice which has obtained generally heretofore of asserting one-half to each the public and the railroad in the case of an existing grade crossing. While this procedure has appeared equitable in the past, the tremendous changes in transportation conditions make necessary a reappraisement of the liabilities of the two parties at interest. The railroad still continues to be the aggressor in preventing the free and unhampered use of the public thoroughfares, but the needs of the traffic on the highway have not only increased and changed in nature, but the use of the highway has become in large measure directly competitive with the rail line. These and incidental conditions following them have changed the benefits flowing from the separation of grades between these two great avenues of traffic."

Distinction Between New Separation and Enlargement of Existing Separation.

It should be kept in mind that all of the analyses cited above apply to NEW grade separations where some measure

of benefit is derived by the railroads. They do establish a measure of reasonable allocation of cost where such benefits accrue to the railroad and automatically fix that percentage at zero in cases of enlarging existing structures where it is conceded that no benefit is enjoyed by the railroad.

[fol. 243]

V.

The Arguments Presented by the Public Utilities Commission and by the City Are Immaterial to the Issues and Reveal the Arbitrary Character of the Commission's Order.

Both the Commission and the City indulge in certain arguments that logically appear to be wholly immaterial to any issue arising herein. For instance, the Commission refers to the Santa Fe's operation of commercial vehicles on the highway, to the increase in the value of Santa Fe stock, and to the claim that the City's contribution must come from local funds (P. U. C. Br. pp. 11, 36).

Petitioner is entirely in accord with the thought that its subsidiary in the trucking business should pay a fair share of the cost of its own rights of way; namely, the public highways, and that the subsidiary has neither a moral nor a legal justification for requiring the parent railroad to help build highways and bridges, for the benefit of competitors of the railroad.

Concerning the necessity of using local funds, these projects can be partly financed from the City's share of State gasoline tax contributions, and often from additional allotments from the County's share of such funds (R. 209, 427, 448; Ex. 29 R. H., p. A-19); however, whether or not the City received a fair share of the tax funds is not relevant to our problem.

The Commission attempts to explain away the *Goshen Junction case* (1933), 38 C. R. C. 380 (P. U. C. Br. p. 28) upon the ground that the then existing depression led the Commission to consider the economic situation and thus change to the benefit method of apportioning costs. In that case, decided nineteen years ago, the Commission expressly [fol. 244] departed from charging the railroad on an arbitrary "obligation" theory and assessed costs to the railroad based upon direct and indirect benefits arrived at by

capitalizing an amount measuring the annual benefits on a six per cent basis. Furthermore, the Commission noted that traffic on the highway had increased and changed in nature and had become directly competitive with the rail lines (see Ex. 29 R. H., Chs. IV and V). This trend has of course continued at an accelerated pace during the past 19 years (see Pet. Op. Br. p. 80, for a more complete statement of this case as well as Railroad's Br. pp. 64-72).

It seems the Commission's opinion is based upon an unexpressed conclusion something like this: The City needs help in financing the new and improved Washington Boulevard and does not desire to use its allocations of state gasoline tax funds and motor vehicle fees for this project. The railroad has been earning a small per cent of profit in recent war and post war years and is able to pay; therefore, why not find a way to require the railroad to pay 50% of the cost now even though it was charged only 25% in 1932.

How else can the Commission's decision be justified or explained? The only answer given in the Commission's opinion is that material changes have taken place since 1932—increases in population and tremendous increase in motor vehicle traffic—but these were the changes pointed out in the *Goshen Junction* decision, *supra*, as requiring a departure from assessing costs on an obligation theory and assessing them on the benefit basis instead. The depression in 1932 is hardly a logical basis for distinguishing the *Goshen Junction* case since it should be remembered that in 1932 we were all in the same hard pressed financial con-
[fol. 245] dition, that is, railroads, citizens, cities and taxpayers alike.

Further, these material changed conditions set forth in the 1932 opinion are such that to require the railroad today to contribute even 25% would be arbitrary and unreasonable. (*Nashville etc. v. Walters* (1935), 294 U. S. 405, 79 L. Ed. 949.)

Since the foundation of the Commission's authority is the police power and only the police power—certainly not the existence of a railroad treasury or ability to pay—can it be that since 1932 a reasonable application of that police

power has changed so materially as to justify ordering the railroad to pay twice as much of the original percentage cost? Neither the Commission nor the City has made any attempt to answer this embarrassing question. Since the Commission makes no logical explanation we can only speculate that the Commission in its 1952 decision decided upon a result satisfactory to the individuals responsible for the decision, having as most of us do natural bents and biases. But we do not have to speculate about the generalities indulged in in the Commission's opinion—they reveal better than anything else how difficult it must have been to write the opinion and to attempt to explain why after 20 years of tremendous highway development and growth of competitive trucking, etc., it was reasonable under the police power to make the railroad pay at double the 25% rate charged in 1932, when in fact, this percentage was too great as judged by the modern conditions.

This then is the real distinction and difference between 1932 and 1952—the whim and caprice, the arbitrary application of "discretion" wielded by men unguided by any [fol. 246] rule or yardstick used to measure *reasonable* application of police power with a view to current conditions and without any effort to make the apportionment bear a substantial relation to the legitimate object sought to be attained.

VI.

The City's "Obstruction Theory" That the Railroad Should Pay All the Costs of the Grade Separation Resulting From the Presence of the Railroad Tracks Is Unrealistic, Unreasonable and Legally Indefensible.

Throughout the proceedings the City has steadfastly maintained that because it has 90-foot easements (City's Br. p. 10) for Washington Boulevard it has right to prevent any use of the ground beneath or the space above the easement in any manner which directly or indirectly interferes with the utilization of such an easement for street purposes (P. U. C. Br. p. 18, City's Br. pp. 6, 60); that because of such legal rights to noninterference the City is entitled to require the railroad to pay the additional cost

resulting from and necessitated by the presence of the railroad tracks, in this case over $700,000.00 (City's Br. p. 16). The same argument could be made in connection with freeway construction in the City. If houses weren't in the way the cost of right of way procurement would be reduced.

The title report (Ex. 59 R. H.) refutes the City's claim. To summarize briefly, the Harbor Line or the westerly tracks across Washington Boulevard are held under a deed dated August 25, 1887, granting the fee in a sixty-six foot wide right of way to the railroad company. The Harbor [fol. 247] Line was in actual use September 23, 1887 (Ex. 64 R. H.). The tracks toward the east composing the railroad's Third District, Main Line, are on land condemned by Respondent's predecessor November 20, 1887, and granted in fee by deeds dated November 22, 1889, and April 9, 1890. This line was in actual use November 24, 1888. Not until December 15, 1890, was the dedication of the streets in the area of the underpasses accepted by the City and there was no dedication by user as shown by the testimony of William F. Martens (R. p. 452). Mr. Martens testified from personal observation that in 1914 there was no street across the Santa Fe's tracks at or near Washington Boulevard. Under these circumstances no franchise from the City is necessary and the railroad's rights are property rights.

In any event, the City found it necessary in 1930 to condemn additional property from the Santa Fe in order to increase the width of its easement for street purposes at the location of the underpasses from sixty to ninety feet, for which the City paid the magnanimous sum of $1.00 for each of five parcels. These titles to land are property rights which the Santa Fe is entitled to have protected under the state and federal constitutions. The City has no more right to unimpeded use of the City's easement than has the railroad to an unimpeded use of a railroad easement or of a railroad interest in the land owned in fee, even though the City subsequently acquired an easement for street purposes. [fol. 248] In *City of Oakland v. Schenck* (1925), 197 Cal. 456, 241 Pac. 545, the railroad appealed from a judgment granting the nominal sum of $1.00 for railroad lands con-

demned by the City of Oakland. Concerning the railroad's property rights, the Court stated as follows:

"It may not be questioned that a railroad's right of way is so far private property as to be entitled to protection of the constitution, so that it can only be taken under the power of eminent domain; and a condition precedent to the exercise of that power is that the statute conferring it make provision for reasonably compensating the owner. (*Western Union Tel. Co. v. Pennsylvania R. R. Co.*, 195 U. S. 540, 570 (1 Ann. Cas. 517, 49 L. Ed. 312, 25 Sup. Ct. Rep. 133, see also Rose's U. S. Notes).) The interest appropriated by the party condemning may be small, and the amount of compensation difficult of proper measurement, but some award should be made, however small the amount may be. . . . *If the opening of the street across the railroad tracks in this case does not unduly interfere with the companies' use for legitimate railroad purposes, then their compensation should be nominal.* (P. 460.) *If, prior to the institution of the condemnation proceedings, the railroad companies had constructed upon the land embraced within the crossing buildings to be used in their business, it would have been necessary, in ascertaining the just compensation to be awarded, to take into consideration the value of such improvements.* (P. 461.) Appellants cannot recover for such costs. The expenses that will be incurred by the railroad companies in making structural changes, such as filling the portion of the tracks between the rails, and two feet outside, with planks, and [fol. 249] other crossing changes, in order that the railroad may be safely operated, necessarily result from the maintenance of a public highway, under legislative sanction, and must be deemed to have been taken into account by the railroad companies when they accepted the privileges and franchises granted by the state. *Such expenses must be regarded as incidental to the police power of the state.* (P. 462.) The acquisition by eminent domain of an easement for street purposes by a municipality is one thing. *The power of the public to require, by subsequent proceedings, that its*

> *highways be made safe to another. . . .* The duty resting on the railroad companies to make the necessary changes and improvements does not arise because of the opening of the street, but because of the obligation imposed through the exercise by the city of the power to order the crossing improved *whenever it becomes necessary for the protection of life and property.*" (P. 462.) (Emphasis added.)

Further defining the property rights held by a railroad in California, the Court stated:

> "In this state there is no such restriction on the right of a railroad company. It may acquire the fee in land by direct purchase, although it may obtain only an easement for railroad purposes if it resort to proceedings in eminent domain." (P. 466.)

The fact that the railroad may, regardless of its property rights, acquire a franchise right to cross the street from the City in no way estops the railroad from claiming all of its constitutional rights incident to property ownership. (*City of San Diego v. Southern Cal. Tel. Co.* (1949), [fol. 250] 92 Cal. App. 2d 793, 808, 208 P. 2d 27, and *Ocean Park etc. Corp. v. Santa Monica* (1940), 40 Cal. App. 2d 76, 104 P. 2d 668.)

We therefore come back to the incontrovertible proposition that, as the City says (City's Br. p. 34): "The instant case represents an exercise of the police power." The railroad's property rights are not dependent upon any reduced status as a citizen, but it is entitled to assert its rights incident to property ownership. Finally, the railroad may not be charged and its property may not be taken under the police power or under the theory of *damnum absque injuria* except upon reasonable application of police power, taking into consideration such factors as which party introduced the danger, and any assessment of costs upon the railroad must "have a substantial relation to the *purpose to be accomplished.*"

Remember that in the 1949 opinion the Commission stated it was *impressed* by the fact that but for the existence of the railroad the City could widen the street at less cost

(49 Cal. P.U.C. 147, at p. 151.) A decision so influenced is patently arbitrary.

In other words, the fact the City holds an easement for street purposes is something very different from the right to require the railroad to participate in the cost of the street, which can be done only when public safety is reasonably involved.

It was further pointed out in *Black v. Southern Pacific* (1932), 124 Cal. App. 321, 331, 12 P. 2d 981, 985:

> "But it is well settled that a railroad right of way is so far private property as to be entitled to the protection of the Constitution, and that it can only [fol. 25] be taken without its consent under the power of eminent domain, a condition precedent to such taking being that provision be made for reasonable compensation to the company."

Thus the conclusion to be reached is that where public safety is not involved, there is no duty on the railroad to expend any of its funds for any portion of the costs of grade separations. (Compare *Northwestern Pac. R. R. Co. v. Superior Court* (1949), 34 Cal. 2d 454, 211 P. 2d 571, holding that a municipality may not interfere with the railroad use of property owned by the railroad even though it pays adequate compensation in condemnation proceedings and then only subject to the orders of the Public Utilities Commission.)

The railroad is, of course, a quasi public corporation. Its lines are devoted to the public use and because of its status it is required to accept the regulation of public authority, but it is, nonetheless, a private owner of property. As an obstructor of the City's desire to widen the street without any additional expense, Petitioner's position is simply this, that in addition to its property rights the rail lines fulfill a public use the same as city streets. The railroads give a *quid pro quo* in service to the public at large in return for their right, based on public need and practical necessity, to operate trains without stopping at traffic signals, and to cross streets, highways, and rivers, etc. The Santa Fe believes that the streets and the rail lines both serve a necessary purpose.

[fol. 252] VII.

Recent Material Changes in Highway Construction and Use, as Well as the Competitive Position of the Railroads, Require a Reappraisement of the Problem of Allocation of Grade Separation Costs.

A few of the significant changes as applied to this matter are worthy of special note and answer the charge "material changes" justify making the railroad pay more:

1. Even allowing for inflation the cost of a "viaduct" built in years gone by is dwarfed by the cost of the elaborate edifices proposed by the applicant in the instant case—a material change indeed!

2. Though the City says in its brief that Washington Boulevard is not a freeway, neither does it resemble the city street of a few years ago. Instead Washington Boulevard is being built into a wide, six lane, cross-city and cross-country thoroughfare intended to carry today's dense traffic expeditiously, to relieve other streets and nearby state highways of traffic congestion, and to expand its capacity as the principal east-west truck route in the City.

3. Vehicles have increased in speed, size and width as well as in speed and volume, making necessary wider highways with wider lanes and more elaborate bridges.

4. The railroads have not expanded materially since the 1920s (R. 212, 251) except for the handling of war traffic (R. 391). Their rights of way, their number of trains and cars have remained nearly static and have not kept pace with the trend of increase of population. [fol. 253] Trucks have taken away substantially all their local traffic and provide for the increased population, so that to only a nominal extent have the railroads shared in the benefits traffic-wise of increasing demands for transportation by an increasing population (182 I. C. C. 253; R. 204).

5. Expediting an ever increasing flow of vehicles to permit more rapid movement between local and distant points without delay at grade crossings has become the important factor and reason for constructing through traffic streets and highways (R. 85, 198, 218, 245).

Thus when the cases say as do even the earlier ones

such as the *Omaha* case, *supra*, that the imposition of costs on the railroad must have *a substantial relation to the purpose to be accomplished*. Petitioner earnestly believes that neither the City nor the Commission should be permitted to take refuge in decisions applicable to the conditions of many years ago; that in this case the Commission just as effectively disregarded the changed circumstances as did the Supreme Court of Tennessee whose action was condemned in the *Nashville* case.

To the casual observer over the past several years, it is obvious that the use of our streets and highways today is entirely different than the use made of them ten, twenty, thirty and forty years ago. Prior to the zenith of railroad development, that is, prior to the early 1920's, the Model T, the horse and wagon, the buggy and the buckboard constituted a large portion of the traffic. A journey of fifty or a hundred miles consumed hours and a transcontinental trip by automobile was a venture. Commercial trucking over long distances was non-existent. *The rails enjoyed a virtual monopoly.*

[fol. 254] Although change in laws and legal viewpoints is slow, progress of highway development has been rapid; so rapid that the legal concept of "continuing obligation" has been outmoded and the obligation has shifted. It is the users and builders of our streets and highways who are disturbing the *status quo*. It is the latter group which is now expanding aggressively and building over and across the steel rails that have been in place for many years. It is the users of the highways who should be required to pay for their own paved right of way. If the trend toward highway development continues as in the past several years and if our states continue to require the railroads to help provide rights of way for a competitive transportation system, what effect will such a policy have on the economic health of the railroad industry, which for the past twenty years has realized only 3.2 per cent net return on its investment (R. H. Tr. 360)? Should not "continuing obligation" give way to "shifting obligation" just as the railroads' monopoly on long-haul overland transportation has given way over the past twenty-five years?

Washington Boulevard reflects the same changes that

have been going on throughout the state and nation (Ex. 29 R. H., Tables 1, 2, 3, 4 and 5). These tables show quite graphically the tremendous increase in recent years of automobile, truck and bus registration. Truck and bus mileage almost doubled from 1936 to 1948 in spite of the war years, a rubber shortage and other shortages. A glance at Table 2 explains fully why the railroads reached their apex of development in the early 1920's and then failed to keep pace with the growing population. Truck registration in the United States was less than 2,000,000 in 1923, [fol. 255] less than 1,000,000 in 1919, but was 7,692,569 in 1949. In California in the seven years between 1941 and 1948, truck registration increased from 343,853 to 547,208. In 1933, the year of the *Goshen Junction* decision (38 C. R. C. 380) when the Commission departed from the fifty per cent formula, there were only 108,189 trucks in California.

Today in the United States there is one truck for every six and one-half automobiles, and it is common knowledge that the highway boxcars have been getting larger and larger. In 1910, the ratio was one truck to forty-seven automobiles (Ex. 29 R. H. 26). The traffic check made on Washington Boulevard (Exs. 39, 40 and 41) revealed an even greater percentage of trucks to automobiles than similar checks on state highways. On Washington Boulevard the ratio was approximately one truck to four automobiles. A comparative traffic count on Highways 101 and 99 showed a minimum ratio of at least six to seven automobiles to one truck (see Ex. 29 R. H., pp. 31-32).

In 1926, the railroads carried eighty-nine per cent of the passenger traffic, buses only 10.9 per cent, but in 1941 the railroad portion was reduced to 68.3 per cent and the bus portion had reached 31.7 per cent (R. H. Tr. 41). Looking at freight traffic in 1926, the railroads carried 450,644 million ton miles as compared to 23,530 million for trucks. In 1941, the railroads handled 480,783 million ton miles, trucks 57,123 million. Increase for the trucks was 142.8 per cent. From 1944 to 1947, the [fol. 256] increase in truck traffic was 58 per cent. This trend continues apace.

In contrast, in 1916, there were 254,000 miles of rail-

way line. In 1949, only 225,100 miles. The effect of Washington Boulevard and similar streets has been to shift short-haul freight traffic from the rails to the trucks, particularly in metropolitan areas such as Los Angeles (Tr. 235, 368). The same is true of passenger traffic (Tr. 482). A wide, expensively built arterial highway, such as Washington Boulevard, is not necessary to move either freight or passengers to the railroad depot and freight house. The wagon and the horse did that adequately over dirt roads and an improved Washington Boulevard is an invitation to take even more traffic from the rails. Washington Boulevard and the highway involved in the *Nashville* case, *supra*, have much in common—both have the effect of shifting traffic from railroad to truck.

In order that the Commission might be fully advised Petitioner placed in evidence at the rehearing an extensive and very complete report, entitled "Elements to Be Considered in Eliminating Railroad-Highway Grade Crossings Allocating Cost of Construction and Enlargement of Separations Evaluating the Accident Hazard and Determining the Relative Benefits." This extensive exhibit of some 110 pages, which was received as Exhibit 29 R. H., is briefly discussed in Petitioners' Summary of Facts (Pet. pp. 26-33). The author, Mr. Arthur C. Jenkins, is an outstanding Consulting Engineer, and for eleven years [fol. 257] was an engineer for the Public Utilities Commission (R. 178). His comprehensive written report and oral evidence probed the fundamentals of this problem before the Court. While the report is too extensive to quote in full, there are here included certain pertinent portions of its text which bring out clearly the salient points of the problem as related to the particular separations in question:

> "During the period of rapid growth of railroad mileage between 1830 and 1916, the highways existing at that time served largely as feeders to the railroads. They brought the raw materials and produce to the railheads for shipment to other parts of the country and similarly they carried the finished goods away from the rail heads after the manufacturing process had been completed and the finished goods

were ready for distribution. In this fashion the railroad and the highway were transportation agencies conducted in a complementary fashion.

"By 1916, however, the era of rail transportation took a turn and the highways came back into prominence. Both private automobiles and trucks began to increase their extent of operations and the passenger bus was appearing upon the scene. Highway competition for intercity traffic, although at that time in an embryonic stage, was destined to grow increasingly important with the passage of time. This transition between modes of transportation and revival of the highway system as an important means of national transportation was influenced materially in its development by the Federal Aid Program for Highway Construction inaugurated in 1916." (P. 43.)*

[fol. 258] "There is a definite relationship between the railroads of the country and the vast and extensive highway system. Railroads are experiencing more and more the competition from the rival forms of transportation operating over the highways both in passenger service and in freight operation. The competition that is created by the modes of transportation on the highways, although it has had a harmful effect upon rail transportation and in other regards, cannot be considered as not in the interest of progress or human development. The highway has brought with it the more flexible rubber-tired mode of transportation and has made it possible to serve a much greater territory directly than has heretofore been the case by railroads alone whose lines by reason of their character are inherently restricted in their total coverage. The competitive aspect, nevertheless, is of serious proportions, particularly in view of certain inherent differences between the two types of operation.

"The growth of population in the State of California has been much more phenomenal than that for the nation as a whole. From a population of 379,994

*Page references are to pages of Exhibit 29 R. H.

in 1860 there has been an increase to 10,472,348 in 1950. The average increase per decade over that period of years has run in the vicinity of 45 or 50 per cent per period.

"In view of these tremendous increases in population it is no wonder that the State of California, particularly in its metropolitan areas, is undergoing such growing pains with respect to its vehicular traffic arteries, thereby necessitating the continuous development of new ways and means of accommodating greater traffic volume by widening and increasing capacity of existing thoroughfares. This again is a [fol. 259] clear indication that such *increases in capacity and construction of roadways and expressways are for the sole purpose of accommodating the increase in vehicular traffic with no relationship whatsoever to the railroads operating in the area under and over whose tracks it may be found necessary to route the new roadways and older ones that are in process of enlargement.*" (P. 8.)

"In carrying out a plan of grade crossing separation, whether it be a single installation or a coordinated program of large-scale construction involving numerous locations, it would appear that logically the theory to be applied in establishing formulae for allocation of cost should be the same. Furthermore, any such project should be viewed in the light of conditions as they exist at the present time and determinations should be based upon a careful analysis of the equities of parties concerned giving due consideration to those factors making it necessary to accomplish the objective, the recipients of the benefits to be derived and economic effect upon the railroads.

"From the point of view of law, the practice is to give material weight to precedence established in previous actions. This practice tends to perpetuate the theories promulgated as a result of conditions existing many years ago without giving due regard to the effect of the tremendous progress in technological development and advancement in mechanization of industry upon the social and economic welfare of the

country. The modern tendency should be to meet technical problems by application of engineering and technical knowledge based upon a sound analysis of the factual features involved.

"There is adequate precedent established to indicate the workability of such a plan and the high [fol. 260] degree of justice resulting from its use. Examples can be found in action taken by the engineering branches of the state government in its highway development activities, as referred to above, and also in the functioning of the Federal Bureau of Public Roads. The latter agency devised a specific and clearcut formula with respect to determining the equities in its national program of highway construction and grade crossing elimination. These are patterns laid down by technical groups eminently qualified in their specialized field and who carry the tremendous responsibility of disbursing millions of dollars of public funds. The several states, without question, accept the formula laid down in the General Administrative Memorandum No. 325 of the U. S. Public Roads Administration when it pertains to funds donated by the Federal Government for state highway purposes." (Pp. 6-7.)

Mr. Jenkins further pointed out in his Report (Ex. 29, R. H.) that delay is the motivating factor at present, rather than safety, for grade separations.

"As the number of grade crossings increased with expansion of railroads and highways, the primary cause for concern was the accident hazard existing at the crossings. It was recognized then and is recognized now that the only effective means of eliminating the hazard is to separate grades of the railroad and the highway. In the early development of the highway system, such separations were constructed for that primary purpose. *During more recent years, however, with the tremendous increase in use of the private automobile, as well as expansion of commercial freight and passenger-carrying operations over the highways, the public resentment against grade crossings and the* [fol. 261] *clamor for an expanded program of crossing*

separations can be attributed in large part to the desire for eliminating the inconvenience and delay to highway traffic caused by railroad trains at highway crossings. The emphasis now is not so much upon eliminating the accident hazard as it is upon expediting the flow of vehicular traffic on the highways, particularly in the highly congested metropolitan areas such as Los Angeles and San Francisco in the west, and New York, Chicago, and Philadelphia in the east. The same degree of impatience is evident on behalf of the average motorist when he is confronted with frustrating traffic congestion on city streets, bridges, freeway approaches, and at other points of thoroughfare clogging. In the general picture, railroads are minor contributors to traffic delay in metropolitan areas.

"As will be shown by factual data in the appendix of this report and in the text, *the railroad now assumes a subordinate position with respect to controlling the design, construction and expansion of the public highway system including its freeways, expressways, multilane highways, and city streets.* Traffic that formerly moved by the more efficient and perhaps less convenient modes of mass transportation has elected to make use of personalized transportation service over the highways and streets, thereby creating traffic congestion and, to a considerable degree, commercial stagnation of central business areas as a result of decentralization —one of the most crucial problems facing the metropolitan areas today. *It is unreasonable to assume that theories propounded in the period from 1860 to 1915, when the railroads predominated the field of long-haul transport, even though they may have been just and fairly administered then, can be taken for granted as* [fol. 262] *constituting equitable treatment now* when the balance of power has swung so far in the other direction as to supremacy of volume of individual vehicle movement." (P. 4.)

The reasons that require a reappraisement of the problem of allocation of grade separation costs were summarized by Mr. Jenkins as follows:

"There are two important principles highlighted by the above discussion. One is that with the tremendous amount of funds that have been appropriated by the federal governmental and administered through one of its principal government agencies, the rules adopted by the government through that agency as to the establishment of the equities involved in the construction of highways, acquisition of properties and rights-of-way, and the separation of railroad grades, must of necessity be given serious consideration as being the product of mature deliberation and able engineering judgment and economic knowledge. Those rules and regulations, theories, and policies established by the federal government in disbursing this tremendous amount of money should not be cast aside as having no bearing upon the issues of an isolated case not included as a part of a national program. They can be looked to with a great deal of confidence as a guide in the establishment of similar formulae for the allocation of costs and recognition of equities involved on any project where the physical aspects are generally the same.

"The second point highlighted is that *the railroads are subjected to tremendous competition by the commercial operators over the highways and that it is illogical to assume that the railroad should be subjected to the major portion or any portion of the cost* [fol. 263] *of constructing facilities that tend to expedite and amplify the competitive aspect*, particularly in those instances where, by such expedited traffic, the railroad stands to realize not one iota of benefit either from the point of view of economics or operation.

"It would appear that the theory propounded in the past and adhered to in some quarters through intervening years, that railroads should carry a continuing obligation to stand the cost of all construction in connection with the building of grade separations and the enlargement and improvement of them, goes

back to the early thinking that developed when the railroads were possibly a complete monopoly and represented a greater hazard to the small amount of traffic which in those days was using the roads and highways. In view of that relatively small volume of traffic and the highly local character it represented at that time when long haul and great distance traffic over the highways was hardly known, it might have been justified in the development of safety measures to assess a heavy responsibility upon the railroads. In consideration of the history of the national highway system, the method by which it is financed, the type of traffic which has been created as a result, and the competitive effect of that traffic upon the railroads, *it appears only logical that the practice of assessing railroads on a continuing obligation theory is outmoded where it involves throwing private funds into the hopper for the purpose of adding to the subsidies already given to competitive highway transportation.*

"A typical and highly important change that has been brought about by the automotive vehicle and the wide application of commercial transport on the exten-
[fol. 264] sive system of highways, freeways and streets, is the decentralization of metropolitan areas such as Los Angeles and San Francisco. This has been brought about by the widespread use of automobiles in home-to-work, business, shopping and pleasure and a lack of sufficient street capacity and parking facilities. It is this trend of use that renders existing automotive thoroughfares inadequate to meet existing and future traffic volumes.

"There has been virtually no change in the extent or character of the transcontinental railroad lines over a period of many years and the changes that have taken place in the metropolitan areas have largely been to make way for the development of those things which are created and expanded by influence of the private automobile." (Pp. 43-44.)

Conclusion.

The issue here is not whether the Washington Boulevard grade separation should be enlarged, but solely whether Petitioner, or any other railroad in a like situation, should pay a share of the cost far exceeding any possible, or even arguable, benefits it might receive.

Neither the Commission nor the City in their Briefs and Answers take any issue with the significant facts that the evidence shows that greater freedom of movement of highway traffic—that is, elimination of vehicular delay upon a major traffic artery—will result from the proposed construction, and is the real and only purpose thereof. Petitioner cannot benefit in any way from this result; indeed, to the extent that competitive traffic (including that moving in private automobiles) using Washington Boulevard is enabled by this improved facility to move more readily or [fol. 93] more cheaply, Petitioner is damaged instead of benefited.

Petitioner's primary obligation at the points of crossing is to do its part in promoting the elimination of those hazards to highway traffic which are incidental to the operation of its railroad. The evidence shows that this obligation was fully discharged many years ago. The proposed widening of the existing separation is plainly not required in the interest of the elimination of grade crossing accidents; and consequently safety considerations cannot be urged as a basis upon which to compel Petitioner to contribute to its cost.

Petitioner will not benefit from the construction through elimination or reduction of interferences with its own operations, for no such interferences now exist. Nor will it benefit appreciably, as apparently believed by the Commission, through the substitution of new and stronger bridge structures for the existing facilities. The latter, though probably not fully conforming to the most recent standards, are entirely adequate and do not presently require replacement.

In the light of the facts and the law, the Commission's order imposing upon Petitioner the payment of approximately $285,000.00, in the face of a complete absence of

any tangible benefits is clearly unfair, unreasonable, arbitrary and burdensome.

It is elementary that Petitioner, like any other citizen, may not be compelled against its will to contribute when [fol. 366] it has no obligation, or to promote the convenience of others (many of them actual or potential competitors) when the net result will be to its own detriment. It is equally well established that the Commission, even though purporting to exercise the police power, may not act arbitrarily, or without adequate evidence to support its conclusions, or in such manner as to deny due process of law or impose undue burden upon interstate commerce.

Nor may the Commission assess costs because it is impressed by the fact it will cost more to widen Washington Boulevard because the railroad is in the way.

The record discloses that the decision here under attack violates these basic principles. Petitioner submits that this Court should issue its writ to review that decision, and upon such review should order the decision annulled and set aside.

Respectfully submitted, Robert W. Walker, J. H. Cummins, *Attorneys for Petitioner.*

[fols. 367-368] In the Supreme Court of the State of California

In the Supreme Court of the State of California

In Bank

The Atchison, Topeka & Santa Fe Railway Co.

v.

Public Utilities Commission, etc., et al.

S.F. 19671

Order Denying Writ of Review—Filed December 11, 1952

Petition for writ of review denied.

Edmonds, J. and Schauer, J. are of the opinion that the petition should be granted.

Shenk, Acting Chief Justice.

(File Endorsement omitted.)

[fol. 269] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

(Title omitted)

PETITION FOR ALLOWANCE OF APPEAL—Filed March 6, 1953

To the Honorable, the Chief Justice of the Supreme Court of the State of California:

Now comes your petitioner The Atchison, Topeka and Santa Fe Railway Company, a corporation, the above named petitioner, and respectfully shows that it duly filed with the Supreme Court of California its Petition for Writ of Review, praying this court to issue its said writ for the purpose of determining the lawfulness of Decision No. 47344 of the Public Utilities Commission of the State of California, dated June 24, 1952, and the Order on Rehearing therein; that by its Petition for Writ of Review your [fol. 270] petitioner raised the federal questions which are the subject of this petition; that on December 11, 1952, this Court rendered and entered its order denying your petitioner's Petition for Writ of Review, and thereby held and decided the said decision of the Public Utilities Commission of the State of California to be valid and lawful; and, that the Supreme Court of California is the highest court of the State of California and the highest court of the said state in which a judgment in this cause could be had;

Wherefore, petitioner, considering itself aggrieved by the aforesaid decree and judgment of the said Court, does, for the reasons set forth in the Statement as to Jurisdiction which is filed herewith, hereby pray that an appeal be allowed to the Supreme Court of the United States from said final decree and judgment for the correction of the errors set forth in the assignment of errors which is filed herewith; that citation be issued in accordance with law; that an order be made with respect to the appeal bond to be given by petitioner; that the amount of security be fixed by the order allowing the appeal; and that the material parts of the record, proceedings and papers upon which said final judgment and decree was based, duly authenticated, be sent to the Supreme Court of the United States

in accordance with the rules in such case made and provided.

[fol. 271-272] Respectfully submitted,

Jonathan C. Gibson, R. S. Outlaw, Robert W. Walker, Kenneth F. Burgess, Douglas F. Smith, Arthur R. Seder, Jr., Counsel for Petitioner.

Sidley, Austin, Burgess & Smith, 11 South La Salle Street, Chicago 3, Illinois, Of Counsel.

[fol. 273] (File endorsement omitted.)

[fol. 274] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ORDER ALLOWING APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed March 6, 1953

The Atchison, Topeka and Santa Fe Railway Company, a corporation, the above-named petitioner, having made and filed its petition praying for an appeal to the Supreme Court of the United States from the final judgment and decree of this court in this cause entered on December 11, 1952, and having presented its assignment of errors and prayer for reversal and its statement as to the jurisdiction of the Supreme Court of the United States on appeal pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided, and it appearing that there was drawn in question in this cause the validity of an order of the Public Utilities Commission [fol. 275-276] of the State of California on the ground of its repugnance to the Constitution and laws of the United States and that the decision of this Court was in favor of its validity,

Now, therefore, it is hereby ordered, that said appeal be and the same is hereby allowed as prayed for.

It is further ordered that the amount of the appeal bond be and the same is hereby fixed in the sum of Five Hundred

Dollars ($500.00) with good and sufficient surety, and shall be conditioned as required by law.

It is further ordered that citation shall issue in accordance with law.

It is further ordered that the Clerk of this Court shall make and transmit to the Supreme Court of the United States under his hand and seal a true copy of the material parts of the record in this cause, in accordance with the rules of the said Court in such cases made and provided.

Gibson, Chief Justice.

Dated: Feb. 26, 1953.

[fol. 277] (File endorsement omitted)

[fol. 278-280] Citation in usual form omitted in printing.

[fol. 281] IN THE SUPREME COURT OF THE UNITED STATES

(Title omitted)

ASSIGNMENT OF ERRORS—Filed March 6, 1953

The above named appellant, The Atchison, Topeka and Santa Fe Railway Company, a corporation, in connection with its petition for the allowance of an appeal to the Supreme Court of the United States, makes the following assignment of errors which it avers occurred and upon which it will rely in its prosecution of the said appeal from the final judgment of the Supreme Court of the State of California entered on December 11, 1952.

The Supreme Court of the State of California erred:

1. In not holding that the Order on Rehearing of the California Public Utilities Commission, contained in its [fol. 282] decision No. 47344, dated June 24, 1952, in that it requires appellant to pay an amount bearing no relation to and in excess of any evaluation of the benefits derived by said appellant from certain proposed crossing struc-

tures, will if enforced operate to deprive the appellant of its property without due process of law and to take its property for public use without just compensation, all in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

2. In not holding that the said Order on Rehearing, insofar as it ordered appellant to bear 50% of the costs of said proposed crossing structures, to be without support in the evidence, without reasonable relation to the evidence, and arbitrary, in violation of the procedural standards guaranteed and required by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

3. In not holding that the said Order on Rehearing, in that it assesses against appellant a share of the cost of the proposed structures disproportionate to its share of the benefits to be derived therefrom, will if enforced, deprive the appellant of equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

4. In not holding that the said Order on Rehearing, in that it requires appellant to pay an amount in excess of any evaluation of the benefits which will accrue to it from the proposed structures and a share of the total cost thereof larger than its proportionate share of the benefits which [fol. 283-284] will accrue therefrom, will if enforced operate to impose an undue and unreasonable burden on interstate commerce, in violation of the Commerce Clause (Article I, Section 8, Paragraph 3) of the Constitution of the United States and the National Transportation Policy enacted by Congress, 54 Stat. 899 (1940).

Wherefore, appellant, The Atchison, Topeka and Santa Fe Railway Company, prays that the final decree and judgment of the Supreme Court of the State of California be reversed and for such other relief as the Court may deem fit and proper.

Jonathan C. Gibson, R. S. Outlaw, Robert W. Walker, Kenneth F. Burgess, Douglas F. Smith, Arthur R. Seder, Jr., Counsel for Appellant.

Sidley, Austin, Burgess & Smith, 11 South La Salle Street, Chicago 3, Illinois, Of Counsel.

[fol. 285] (File endorsement omitted)

[fol. 286-289] Statement Required by Paragraph 2, Rule 12 of the Rules of the Supreme Court of the United States (omitted in printing)

[fol. 290-293] Praecipe (omitted in printing)

[fol. 294-295] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 296] In the Supreme Court of the United States
October Term, 1952

No. 667

The Atchison, Topeka & Santa Fe Railway Company, a corporation, Appellant,

vs.

Public Utilities Commission of the State of California, and City of Los Angeles, a municipal corporation, Appellees.

Appeal from the Supreme Court of the State of California

Statement of Points Relied Upon and Designation of Record for Printing—Filed March 25, 1953

Pursuant to Rule 13, paragraph 9 of this Court, Appellant states as follows:

1. Appellant adopts for its statement of points upon which it intends to rely in its appeal to this Court the points contained in its Assignment of Errors heretofore filed.

2. Appellant designates the entire record herein for printing by the Clerk of this Court.

[fol. 297] Jonathan C. Gibson, R. S. Outlaw, Robert W. Walker, Kenneth F. Burgess, Douglas F. Smith, Arthur R. Seder, Jr., Attorneys for Appellant.
Sidley, Austin, Burgess & Smith, 11 South La Salle Street, Chicago 3, Illinois, Of Counsel.

[fol. 298-300] Proofs of Service (omitted in printing)

[fol. 301] (File endorsement omitted)

[fol. 302] SUPREME COURT OF THE UNITED STATES
No. 667, October Term, 1952.

(Title omitted)

ORDER POSTPONING JURISDICTION—May 18, 1953

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court is postponed to the hearing of the case on the merits and the case is transferred to the summary docket.

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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1953

No. 43

SOUTHERN PACIFIC COMPANY, APPELLANT,

vs.

PUBLIC UTILITIES COMMISSION OF CALIFORNIA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

FILED APRIL 21, 1953

Jurisdiction postponed May 18, 1953

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 43

SOUTHERN PACIFIC COMPANY, APPELLANT,

vs.

PUBLIC UTILITIES COMMISSION OF CALIFORNIA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 1, 1963.

—8950

S. T. No. 18704

In the Supreme Court of the State of California

Southern Pacific Company,
a corporation,

Petitioner,

vs.

Public Utilities Commission of the State of California and R. E. Mitchell-starr, Justus F. Craemer, Harold P. Hoag, Kenneth Porter and Peter E. Mitchell, as members of and constituting said Commission,

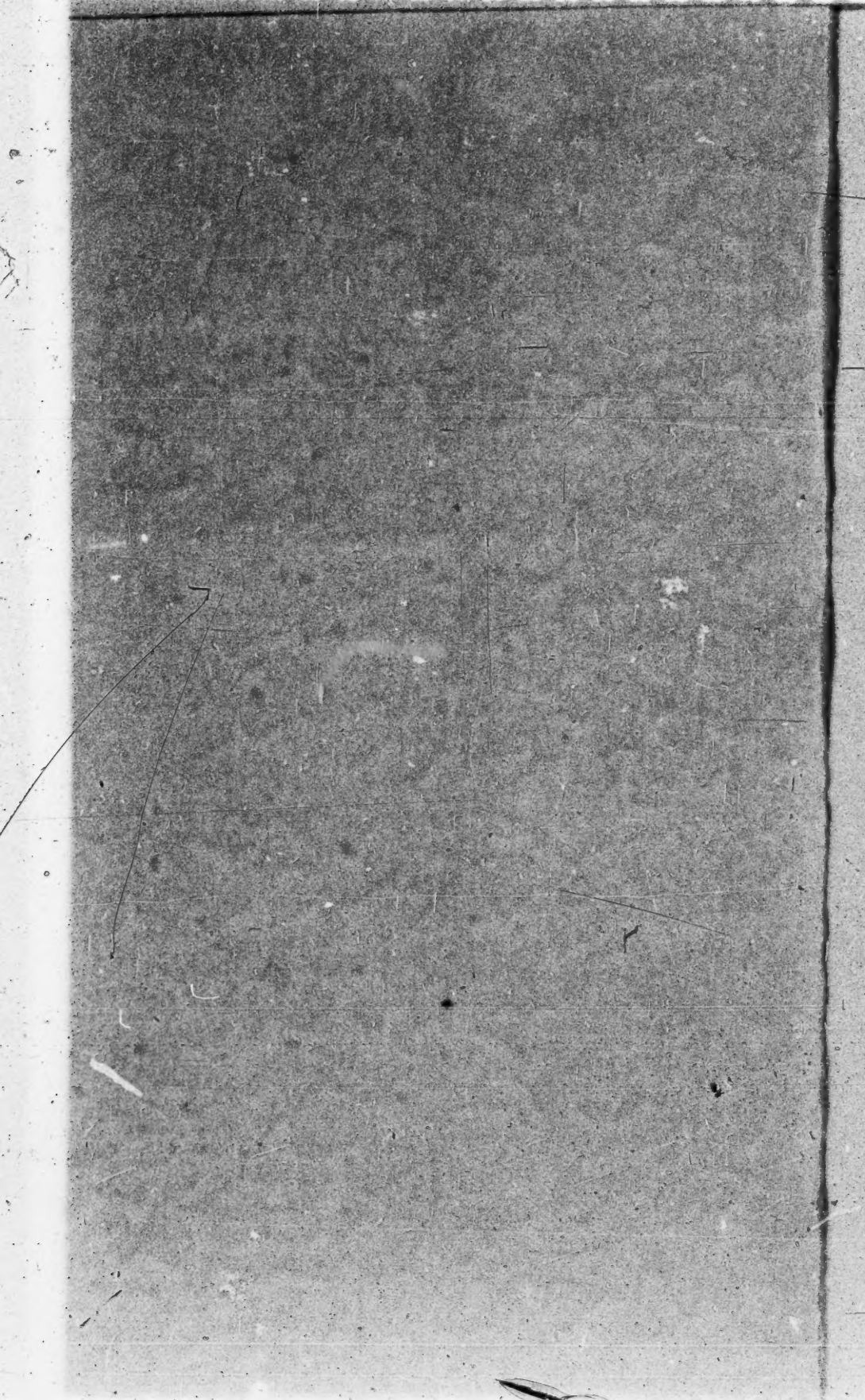
Respondents.

Petition for Writ of Review with Memorandum of Points and Authorities in Support Thereof

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(b) Petitioner Has Not, by Any Act, Action or Omission of Its Own Created or Increased Any Hazard, Inconvenience, Obstruction, or Interference Affecting the General Public, or Those Portions Thereof Who Use the Los Feliz Crossing; Any Such Condition, to the Extent That They May Exist, Having Arisen Out of Circumstances Wholly Beyond Petitioner's Control or Responsibility 60

Note: The discussion in this subdivision covers also Specification of Error No. 7 set forth in the petition as follows: "7. The Commission's orders, in apportioning to petitioner 50% of the cost of the proposed construction, are invalid and beyond the authority of the Commission, and the ultimate findings of fact on which such action is based are not supported by, and are contrary to, the evidence."

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S. F. No.

In the Supreme Court of the State of California

SOUTHERN PACIFIC COMPANY, a corporation,

Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and R. E. MITTELSTAEDT, JUSTUS F. CRAEMER, HAROLD P. HULS, KENNETH POTTER and PETER E. MITCHELL, as members of and constituting said Commission,

Respondents.

Petition for Writ of Review

To the Honorable Phil S. Gibson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of California:

Petitioner, Southern Pacific Company, hereby respectfully petitions the Court to issue a writ of review for the purpose of having the Court determine the lawfulness of Decision No. 47420 and Decision No. 47597 of the Public Utilities Commission of the State of California. Petitioner prays for the issuance of such writ upon the grounds here-

inafter set forth, severally and collectively, each ground being without limitation of any other. The attached Memorandum of Points and Authorities and Appendix are for all purposes incorporated herein by reference.

I.

STATUS OF THE PARTIES

Petitioner is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and has its principal place of business at 65 Market Street, San Francisco 5, California. Petitioner is a common carrier by railroad as defined in Section 211 of the Public Utilities Code of California, and as such is subject to all applicable provisions of the Public Utilities Act (Sections 201-2113 of the Public Utilities Code). Petitioner is a common carrier by railroad, engaged in the transportation of passengers and property in interstate commerce, as defined in Section 1 of the Interstate Commerce Act (Title 49, U. S. Code, Sec. 1), and as such is subject to all applicable provisions of the Interstate Commerce Act.

Respondent Public Utilities Commission of the State of California, for convenience referred to herein and in the appended Memorandum of Points and Authorities as "the Commission," exists by virtue of the Constitution and laws of California, particularly Section 22 of Article XII of the Constitution, as amended, and the portion of the Public Utilities Code known as the Public Utilities Act. The individual respondents are the duly appointed, qualified, and acting members of the Commission.

II.

THE PROCEEDINGS IN WHICH DECISIONS NOS. 47420 AND 47897 WERE RENDERED BY THE COMMISSION

On May 7, 1951, the City of Glendale, a municipal corporation, made formal application to the Commission for the entry of an order, pursuant to the provisions of Section 43(b) of the Public Utilities Act (now Section 1202(c) of the Public Utilities Code) authorizing and requiring the separation of the railroad and highway grades at the existing grade-crossing of petitioner's main line, at Los Feliz Road (also known as Los Feliz Boulevard, and for convenience hereafter referred to as "Los Feliz") within said City; and apportioning as between said City of Glendale, the City of Los Angeles, and petitioner, the costs of construction of said separation. Said application was designated by the Commission as Application No. 32385; and a copy thereof is reproduced in the Appendix hereto, as Exhibit A.

Subsequently, on September 25, 1951, the Commission, on its own motion, issued an order instituting an investigation (identified as its case No. 5327) for the purpose of determining:

(1) Whether in the interests of public safety, convenience, and necessity, the aforesaid Los Feliz grade-crossing should be replaced by a grade separation, and

(2) The division and allocation of the costs of construction, as between your petitioner, the Cities of Los Angeles and Glendale, the County of Los Angeles, and the Department of Public Works, Division of Highways, State of California. Said investigation was subsequently consolidated with Application No. 32385 for purposes of hearing

and decision, and thereafter was handled jointly with said application, as a single proceeding. A copy of the order of September 25, 1951, instituting said investigation, is set forth in the Appendix hereto as Exhibit B.

Due hearing of the consolidated proceeding was held at Los Angeles on October 3, November 1, and November 29, 1951, and oral and documentary evidence[1] was received. Following the hearings, briefs were filed with the Commission on behalf of certain of the parties in interest, and the proceeding was duly submitted for a decision.

Under date of June 30, 1952, the Commission rendered its decision No. 47420 in said consolidated proceeding, a copy of which decision is set forth as Exhibit C in the Appendix. In the order annexed to said decision, as a part thereof, the Commission, in effect, directed the separation of the Los Feliz crossing by the construction of an underpass for the street, subject to certain conditions, which conditions, as far as material to this proceeding, are as follows:

1. The estimated cost of the structure, $1,493,200, is to be paid 50% by petitioner, Southern Pacific Company, 25% by the County of Los Angeles, 12½% by the City of Glendale, and 12½% by the City of Los Angeles.

2. Upon completion of the construction of the separation, the cost of maintaining the superstructure thereof shall be borne by petitioner; the remainder of the cost of maintenance of the structure to be borne by the City of Glendale.

3. The City of Glendale is to prepare detailed plans for the construction of the grade separation, submitting the

1. A summary of the portions of such evidence bearing upon the issues presented by this petition is included as Exhibit J, pp. 104 to 120, of the Appendix to the Memorandum of Points and Authorities filed herewith.

same to the other interested parties, and to the Commission for approval.

4. The City of Glendale is to undertake the construction and, upon receiving the Commission's approval of the plans, to begin such construction and be responsible for its completion.

5. As various stages of the project are completed and payments therefor become due, such payments on account shall be contributed by the interested parties, in the proportions above specified.

6. The construction is to be commenced within one year and completed within two years, unless further time is needed and requested.

On July 9, 1952, and within the period specified by Section 1731 of the Public Utilities Code, petitioner served and filed its application for re-hearing in respect to the matters determined by Decision No. 47420. A copy of said application is reproduced as Exhibit D in the Appendix hereto.

On August 19, 1952, the Commission rendered its Decision 47597, consisting of its order denying petitioner's application for rehearing, and modifying slightly the language of the opinion forming a part of its Decision No. 47420. A copy of said Decision No. 47597 is set forth in the Appendix hereto as Exhibit E. The precise modification made by the Commission in Decision No. 47597 did not include any alteration of its prior conclusions, but consisted simply in substituting the words "spur track" for "yard track" in line 11 on page 2 of the original mimeographed decision, and the figure $746,600 for $746,000, in line 26, page 15, thereof.

III.

JURISDICTION OF THE COURT

The jurisdiction of this Court is invoked under Sections 1756 to 1760, inclusive, of the Public Utilities Code, as interpreted and applied by this Court in *Southern California Edison Company v. Railroad Commission*, 6 Cal.2d 737, 59 Pac.(2) 536, and *American Toll Bridge Co. v. Railroad Commission*, 13 Cal.2d 184, 191-4, 88 Pac.(2) 1, under which no court of this state, other than the Supreme Court, is authorized and empowered to review a decision of the Commission, for the purposes of having the lawfulness of the original order or decision or of the order or decision on re-hearing inquired into and determined. This Court is by said statute vested with power to determine whether the Commission has regularly pursued its authority, including a determination whether the order or decision under review violates any right of petitioner under the Constitution of the United States or of the State of California. Section 1758 of the Public Utilities Code provides that upon hearing, "the Supreme Court shall enter judgment either affirming or setting aside the order or decision of the Commission."

Section 1760 of the Public Utilities Code provides:

"Sec. 1760. *When Supreme Court to exercise independent judgment on law and facts.* In any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final."

Petitioner has no remedy in any court of this State save by action of this Court in response to this petition; and unless the writ of review prayed for is granted, and determination made accordingly by this Court of the questions of law presented by the record, petitioner will be denied in any court of this State that judicial review to which it is entitled under the due-process clauses of the Fourteenth Amendment to the Federal Constitution and Section 13 of Article I of the Constitution of California.

IV.

SPECIFICATIONS OF ERRORS

Petitioner respectfully shows and alleges that the respondents, in rendering said Decisions Nos. 47420 and 47807, have not regularly pursued their lawful authority, have acted in excess of their jurisdiction, have wrongfully deprived petitioner of rights and property without due process of law, have denied to petitioner the equal protection of the laws, in violation of the Constitutions of the United States and of this State, and have taken action which results in undue and therefore unconstitutional burdens upon interstate commerce. More specifically, said respondents have erred in each and all of the following particulars:

1. The orders of the Commission under challenge herein undertake to allocate to and impose upon petitioner a proportion of the costs of the construction in question greatly in excess of any amounts which would be warranted by the benefits accruing to the petitioner from such construction,

and which proportion is in fact wholly unrelated to such benefits; and said orders therefore operate:

(a) to deprive petitioner of its property without due process or just compensation, and,

(b) to subject petitioner and its facilities to undue, unreasonable, and excessive burdens.

2. Because of allocating such excessive and unrelated costs to be paid by petitioner, the Commission's order if enforced would require petitioner to subsidize its competitors, and to injure its own business correspondingly.

3. The orders of the Commission, if considered as a purported exercise of the police power, are unjustified and unreasonable, in that:

(a) no material considerations of safety of persons or property are involved, or shown to exist, in the situation to which said orders are directed;

(b) petitioner has not, by any act, action or omission of its own created or increased any hazard, inconvenience, obstruction, or interference affecting the general public, or those portions thereof who use the Los Feliz crossing; any such conditions, to the extent that they may exist, having arisen out of circumstances wholly beyond petitioner's control or responsibility.

4. The allocation to petitioner of 50% of the cost of said construction is purely arbitrary, having no evidentiary basis whatsoever, and is wholly unrelated to any consideration of benefit to petitioner.

5. The Commission in its orders and decisions herein has failed to find ultimate facts on material issues, has made findings not supported by any substantial evidence, and further has made findings contrary to the evidence, and thus has denied to petitioner its constitutional rights to due process.

6. The Commission's order burdens interstate commerce, in violation of the Commerce Clause (Art. I, Sect. 8, par. 3) of the Constitution of the United States, and the "National Transportation Policy" enacted by Congress (54 Stats. 899; U.S.C.A. Title 49, before Part I, Chap. 1). The underpass in question is but one project in several states through which petitioner operates, which states are looking forward to many such projects in the future.

7. The Commission's orders, in apportioning to petitioner 50% of the cost of the proposed construction, are invalid and beyond the authority of the Commission, and the ultimate findings of fact on which such action is based are not supported by, and are contrary to, the evidence.

WHEREFORE, Petitioner prays that this Court issue a writ of review requiring respondents to certify to the Court its complete record in Application No. 32385 and Case No. 5327, including all pleadings, orders, memoranda, reporters' transcripts and exhibits forming a part of that record; that this Court review the record of said proceedings, and thereupon annul and set aside Decisions Nos. 47420 and 47597; that in the meantime the respondents, and each of them, be required to desist from further proceedings in said matters to be reviewed, and that the order requiring petitioner to pay a portion of the costs of the proposed

project be stayed; and that this Court afford petitioner such further relief as may be meet and proper.

Respectfully submitted,

E. J. Foulis,
Burton Mason,
Randolph Karr,
Attorneys for Petitioner.

San Francisco, California
September 12, 1952

State of California
City and County of San Francisco—ss.

R. G. Hillebrand, being first duly sworn, deposes and says:

That he is an officer, to wit, Assistant Secretary of Southern Pacific Company, a corporation, the petitioner named in the foregoing petition, and makes this verification for and on its behalf; that he has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge except as to matters therein stated on information and belief, and as to those matters that he believes it to be true.

R. G. Hillebrand

Subscribed and sworn to before me
this 12th day of September, 1952

Norman T. Stone

Notary Public in and for the City
and County of San Francisco, State
of California

(Memorandum of Points and Authorities and Appendix follow)

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I. The orders of the Commission under challenge herein undertake to allocate to and impose upon petitioner a proportion of the costs of the construction in question greatly in excess of any amounts which would be warranted by the benefits accruing to the petitioner from such construction, and which proportion is in fact wholly unrelated to such benefits; and said orders therefore operate;

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S. F. No.

In the Supreme Court of the State of California

SOUTHERN PACIFIC COMPANY,
a corporation,
Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and R. E. MITTELSTAEDT, JUSTUS F. CRAEMER, HAROLD P. HULS, KENNETH POTTER and PETER E. MITCHELL, as members of and constituting said Commission,
Respondents.

Memorandum of Points and Authorities in Support of Petition for Writ of Review

FOREWORD

As appears in more detail in the foregoing petition and by reference to the text of the orders themselves, the order of the Commission here particularly challenged (No. 47420) embodies the Commission's approval of a proposal made by the City of Glendale for the construction of a grade separation, in place of the present grade-crossing, at the intersection of petitioner's main line with Los Feliz, adjacent to the west boundary of said City.

The Commission's said order further deals with certain matters arising in connection with that proposal, namely:

(a) it prescribes that the separation shall be a roadway underpass;

(b) it reviews and settles the question of the nature of the drainage facilities required;

(c) the dates for the commencement and completion of the project are specified;

(d) provision is made for subsequent maintenance of the structure; and,

(e) most important of all, so far as the instant case is concerned, an allocation is made, as between the several parties in interest, of their respective proportions of the cost of the new structure.

It is important at the outset to note that petitioner did not, at any stage of the proceedings, and does not now oppose the construction of a grade separation at Los Feliz. On the contrary, petitioner has favored and supported that proposal. Its representatives have cooperated fully with representatives of other parties in interest, including the members of the Commission's own staff, in conducting studies and preparing plans in connection therewith, and in presenting the same to the Commission at the formal hearing (for example, see Exhibit 2 of the record before the Commission). Petitioner has recognized that this separation will be of substantial benefit to the public, in not only the Cities of Glendale and Los Angeles, but also Los Angeles County and the State of California at large, in promoting the freedom of movement of persons and property by motor vehicle upon a public highway which is geographically important as both a main artery between

the two cities and also as a major connection with the state and Federal highway systems. While there is no pretense that any substantial safety consideration could be urged to support the proposal (the Los Feliz crossing having been the scene of only 14 accidents, involving only 9 personal injuries and 1 fatality, over the period of more than 25 years last past: see Exhibit 2, p. 30 reproduced as p. 89, Ex. F of the Appendix), on the other hand it is clear that delay and inconvenience to a substantial volume of motorized traffic would be eliminated, with resulting actual material benefits to the traveling and shipping public, and correspondingly to the interested political subdivisions above referred to.

Petitioner recognizes further that it will itself receive incidental, but nevertheless measurable benefits from the separation, and is prepared and willing to contribute as its share of the overall cost a sum equal to the computed value of such benefit. As the record fully shows, and the facts set forth by Decision No. 47420 indicate, in the instant case that value is $118,340, said sum being based on the net saving in annual expense ($5917) now incurred, but which would be eliminated, capitalized at 5% per annum. The amount allocated to petitioner by the Commission is, however, $746,600, representing 50% of the estimated overall cost of the project, as set forth in the Commission's findings.

Thus this petition is directed principally to the Commission's action in allocating to petitioner, as its contribution, an amount substantially exceeding and indeed having no relation to the actual benefits accruing to the petitioner, and to the Commission's failure and refusal to limit such allocation to the amount shown to represent the fair value of such benefits.

It may be noted that petitioner does not here concern itself directly with the Commission's apportionment, as between the other parties to the proceeding, of that portion of the overall cost not allocated to petitioner. However, petitioner does direct attention to the fact that the Commission, in making its apportionment between these other parties, has apparently followed the benefit principle to some extent, though refusing to do so in making the apportionment as between the petitioner and the other parties: a feature of the decision which clearly indicates the purely arbitrary nature of the allocation.

I

THE ORDERS OF THE COMMISSION UNDER CHALLENGE HEREIN UNDERTAKE TO ALLOCATE TO AND IMPOSE UPON PETITIONER A PROPORTION OF THE COSTS OF THE CONSTRUCTION IN QUESTION GREATLY IN EXCESS OF ANY AMOUNTS WHICH WOULD BE WARRANTED BY THE BENEFITS ACCRUING TO THE PETITIONER FROM SUCH CONSTRUCTION, AND WHICH PROPORTION IS IN FACT WHOLLY UNRELATED TO SUCH BENEFITS; AND SAID ORDERS THEREFORE OPERATE:

(a) To Deprive Petitioner of Its Property Without Due Process or Just Compensation, and

(b) To Subject Petitioner and Its Facilities to Undue, Unreasonable, and Excessive Burdens.

Note: The discussion in this subdivision covers also specification of error #6 set forth in the petition as follows: "6. The Commission's order burdens interstate commerce, in violation of the Commerce Clause (Art. I, Sect. 8, par. 3) of the Constitution of the United States, and the 'National Transportation Policy' enacted by Congress (54 Stats. 899; U.S.C.A. Title 49, before Part I, Chap. 1). The underpass in question is but one project in several states through which petitioner operates, which states are looking forward to many such projects in the future."

As already stated, the primary issue in this case arises because the Commission has refused to follow the fundamental principle of apportioning contributions on the basis of benefits and need, has employed a purely arbitrary allocation. The Commission's own explanation of its actions, so far as it concerns the proportion to be paid by petitioner, is contained in the following excerpt from its Opinion in Decision No. 47420 (Appendix, p. 32):

> "While the railroad contended that the costs should be assessed according to the so-called 'benefits' theory, we affirm our holding in Decision No. 47344, dated June 24, 1952, on Application No. 29396, wherein it was held that the authority of this Commission to allocate costs stems primarily from Section 1202 of the Public Utilities Code and is an exercise of the police power on the part of the State of California through the medium of its agency, the Public Utilities Commission. Therefore, we are not bound to follow the so-called 'benefits' theory, although it is appropriate to observe that the proposed grade separation will obviously be of benefit to the railroad."

In its Decision No. 47344* dated June 24, 1952, in Application No. 29396 (also known as the *Washington Boulevard Case*) to which reference is made in the excerpt just quoted, the Commission had said:

> "The authority of this Commission to allocate costs, as designated in Section 1202 of the Public Utilities Code, supra, is an exercise of the police power on the part of the State of California through the medium of its agency, the Public Utilities Commission. We hold that the law is well established that under the exercise

(*) A petition for a writ of review directed to this decision was filed in this Court on July 24, 1952, and is now pending as S.F. 18671, "A. T. & S. F. Railway Co. vs. Public Utilities Commission."

of the police power a state may regulate the crossings of railroads with its highways, and may require grade separations to be erected and maintained, apportioning the costs in the exercise of its sound discretion. (*Erie Railroad Company v. Board of Public Utility Commissioners*, 1920, 254 U.S. 394; 65 L. ed. 322; *Chicago, Milwaukee and Saint Paul Railway Company v. Minneapolis*, 1914, 232 U.S. 430; 58 L. ed. 671; *Missouri Pacific Railway Company v. Omaha*, 1914, 235 U.S. 121; 59 L. ed. 157; *Lehigh Valley Railroad Company v. Board of Public Utility Commissioners*, 1928, 278 U.S. 24; 73 L. ed. 161)."

Notwithstanding the Commission's repeated assertion that it is not bound to follow the so-called "benefit theory" in grade-separation cases, the fact is that the benefit principle received the approval of this Court, in a case arising shortly after the 1915 amendments to the Public Utilities Act were adopted:

City of San Jose v. Railroad Commission, (1917) 175 Cal. 284, 165 Pac. 967.

In that case the City of San Jose challenged an order of the Commission allocating to said city 35% of the cost of a grade separation of one of its major streets, and contended that in so doing, or indeed in allocating to it (the city) any portion of the cost, the Commission had exceeded its lawful authority. It may be noted that the order had allocated 50% of the cost to the railroad company, and 15% to the State Highway Commission.

This Court sustained the Commission's order, saying in part (at page 289):

"The right of apportionment of the cost by the Commission *to the parties benefited* by the crossing is a proper element of this cognate power (of the Commission). That a city receives *benefit* from a safety device such as that here contemplated may not be doubted." (Emphasis added).

These expressions were cited with apparent approval and in part quoted by this Court in:

S. H. Chase Lumber Co. v. Railroad Commission (1931) 212 Cal. 691, (701), 300 Pac. 12.

Note should also be taken of this Court's citation, in the *San Jose* opinion, and reliance on three other opinions approving apportionment of grade-separation costs on the benefit basis:

Town of Polk v. Railroad Commission, 154 Wis. 523, 143 N.W. 191;

City of Milwaukee v. Railroad Commission, 162 Wis. 127, 155 N.W. 948;

In Re Erie Railroad Company, 208 N.Y. 486, 102 N.E. 562.

In the *Milwaukee Case*, the Supreme Court of Wisconsin had said, in language also quoted by this Court:

"The growth of the city and of the railroads has been coincident, interdependent, inseparable, and from this growth has arisen the great danger of the grade crossing. Why should not the expense of removing that danger be equitably shared by the different agencies whose joint growth has brought it about?"

It will be noted that in the Commission's opinion in the *Washington Boulevard* Case, four decisions of the United

States Supreme Court are cited, apparently with the thought that they support the Commission's statement of its understanding of the controlling principles of law. These four cases are discussed in more detail hereafter in this memorandum. Attention is called to them at this point solely in order to emphasize that they do not constitute the latest pronouncements of the Court on this issue and, that to the extent that they follow a principle in conflict with that Court's more recent expressions, they must be considered to have been overruled or, in any event, greatly limited in their application. The latest decision of the Court bearing directly upon this question is:

Nashville, C. and St. L. Ry. Co. v. Walters, (1935), 294 U.S. 405, 79 L. ed. 949.

In that case the Court reversed a judgment of the Supreme Court of Tennessee, which had held that the railroad company was properly chargeable with 50% of the cost of an underpass on a main state highway. The primary ground of the decision was that the action of the state violated the due-process clause of the Fourteenth Amendment. The Court said, in part (at p. 416):

> "The charge of arbitrariness is based primarily upon the revolutionary changes incident to transportation wrought in recent years by the widespread introduction of motor vehicles; the assumption by the Federal Government of the functions of road builder; the resulting depletion of rail revenues; the change in the character, the construction and the use of highways; the change in the occasion for elimination of grade crossings, in the purpose of such elimination, and in the chief beneficiaries thereof; and the change in the

relative responsibility of the railroads and vehicles moving on the highways as elements of danger and causes of accidents."

Further, the Court said (at pp. 421-424):

"The main purpose of grade separation therefore is now the furtherance of uninterrupted, rapid movement by motor vehicles. In this respect grade separation is a desirable engineering feature comparable to removal of grades and curves, to widening the highway, to strengthening and draining it, to shortening distance, to setting up guard rails, and to bridging streams. The railroad has ceased to be the prime instrument of danger and the main cause of accidents. It is the railroad which now requires protection from dangers incident to motor transportation. Prior to the establishment of the Federal-aid system, Tennessee highways were built under the direction of the county courts, and paid for out of funds raised locally by taxation or otherwise. They served, in the main, local traffic. The long distance traffic was served almost wholly by the railroads and the water lines. Under those conditions the occasion for separation of grades was mainly the danger incident to rail operations; and the promotion of safety was then the main purpose of grade separation. Then, it was reasonable to impose upon the railroad a large part of the cost of eliminating grade crossings; and the imposition was rarely a hardship. For the need for eliminating existing crossings, and the need of new highways free from grade crossings, arose usually from the growth of the community in which the grade separation was made; this growth was mainly the result of the transportation facilities offered through the railroad; the separation of grade crossings was a normal incident of the

growth of rail operations; and as the highways were then feeders of rail traffic, the community's growth and every improvement of highway facilities benefited the railroad. The effect upon the railroad of constructing Federal-aid highways, like that here in question, is entirely different. They are not feeders of rail traffic. They deplete the existing rail traffic and the revenues of the railroads. Separation of grades serves to intensify the motor competition and to further deplete rail traffic. The avoidance thereby made possible of traffic interruptions incident to crossing at grade is now of far greater importance to the highway users than it is to the railroad crossed. For the rail operations are few; those of motor vehicles very numerous."

Again the Court said (pp. 428-430):

"The promotion of public convenience will not justify requiring of a railroad, any more than of others, the expenditure of money, unless it can be shown that a duty to provide the particular convenience rests upon it. *Missouri Pacific Ry. v. Nebraska*, 164 U.S. 403; *Missouri Pacific Ry. v. Nebraska*, 217 U.S. 196; *Great Northern Ry. v. Minnesota*, 238 U.S. 340; *Great Northern Ry. v. Cahill*, 253 U.S. 71. These were the authorities relied upon by this Court in *Chicago, St. P. M. & O. Ry. v. Holsbery*, 262 U.S. 162, 167, where it held that to require a railroad to provide, at its own expense, an underpass, not primarily as a safety measure but for private convenience, was a denial of due process.

It is true that the police power embraces regulations designed to promote public convenience or the general welfare, and not merely those in the interest of public health, safety and morals. *Chicago, B. & Q. R. Co. v.*

Illinois ex rel. Drainage Commissioners, 200 U.S. 561, 592. And it was stipulated that 'in the light of modern motor vehicular traffic anything which slows up that traffic is an inconvenience. In other words, eliminating a grade crossing, as in the case at bar, facilitates the speed of motor vehicular traffic, in accordance with public demands.' But when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured. Compare *Hadacheck v. Los Angeles*, 239 U.S. 394; *Müller v. Schoene*, 276 U.S. 272. While moneys raised by general taxation may constitutionally be applied to purposes from which the individual taxed may receive no benefit, and indeed, suffer serious detriment; *St. Louis & Southwestern Ry. v. Nattin*, 277 U.S. 157, 159; *Memphis & Charleston Ry. v. Pace*, 282 U.S. 241, 246; so-called assessments for public improvements laid upon particular property owners are ordinarily constitutional only if based on benefits received by them."

The Court's opinion leaves no doubt that a mere arbitrary allocation of cost, without consideration of the benefits received, constitutes a denial of due-process and a consequent violation of constitutional rights. It is appropriate therefore to call attention to the striking similarity between the facts especially referred to by the Court in the cited case, and those facts of the present case which the Commission has apparently refused to consider as having particular significance.

In the first place, as in the cited case, the proposed separation will not reduce or eliminate any substantial hazard to the traveling or motoring public at the existing grade

crossing, for with the present protection there is in fact no material actual hazard (see Ex. 2, pp. 28, 30, Appendix, pp. 87, 89). In short, no real question of public safety is here presented. In the second place, again as in the cited case, the sole motivating consideration for the present proposal is the freedom of movement of highway traffic; i.e., the elimination of delays to motor vehicles at both the crossing itself and also the nearby intersection of Los Feliz with U.S. 99 (San Fernando Road). In the third place, and again as in the cited case, the roadway involved is not merely a local road, or an actual or potential "feeder of rail traffic", but is both a main artery between the two cities immediately involved, and an important link in through routes from and to points and areas far outside of and beyond those cities, and in fact is used by a substantial volume of motor-borne traffic from and to points and districts served by petitioner, which conceivably might to some extent move as rail-borne traffic over petitioner's lines. Thus here, as in the cited case, the existing roadway presently serves to deplete petitioner's traffic and revenue; and the separation, by improving the roadway further and adding to its convenience and attractiveness, will serve to intensify the motor competition and to injure petitioner still more.

As the Supreme Court pointed out—and the same observation is emphatically pertinent to the case at bar—the avoidance of interruption and delay is of far greater importance to the highway users than to the railroad. Indeed, in the present case such avoidance does not concern the railroad at all, for there is no showing, nor even any claim, that its trains have been delayed at the present crossing.

In this respect, the highway traffic will be the sole beneficiary of the separation.

The Trend of the Commission's Rulings: the "Barrier Concept," as Opposed to the "Benefit Principle"

While the Commission's order, challenged but sustained in the *San Jose case*, supra, imported at least a partial acceptance of the benefit principle of allocating grade-separation costs, later decisions of the Commission, rendered *prior* to 1933, showed some disposition on its part to be influenced by the so-called "barrier" concept. Thus, in Decision No. 24782, *Application of the City of San Bernardino* (May 23, 1932) 37 C.R.C. 506, the question was raised as to the participation of a railway company (the Santa Fe) in the cost of widening and extending a railroad overpass within the city. The opinion states that the street involved was of some importance, as a connection between major highways serving other cities and areas, as well as affording direct communication between districts within the city. The railroad contended that it would not receive any benefit from the proposed reconstruction, and therefore should not contribute. The Commission, in its opinion, said in part (at pp. 508-509):

> "The representative of The Atchison, Topeka and Santa Fe Railway Company testified that the expense of widening and reconstructing the viaduct was not economically justified at this time and that the railroad company should not be assessed with any part of the cost inasmuch as the railroad company would not be benefited by such widening and reconstruction. We can not subscribe to this opinion since it has been clearly shown that certain hazards now exist on this

viaduct which should be eliminated and that while certain reconstruction work is necessary in connection with the removal of these hazards, it is only reasonable to redesign the structure so as to adequately accommodate present and reasonably anticipated future traffic. *The matter of direct financial benefits is not the sole test in the determination of the respective portions which the railroad and the public should contribute toward the cost of such improvement.* In apportioning the cost of reconstructing this viaduct between the applicant and the railroad company, due consideration should be given to the obligation of each party, as well as to the benefits to be derived. It should be recognized that the railroad has a continual obligation to participate in the matter of constructing and maintaining reasonable and adequate crossings over its tracks, both at grade and at separated grades. This obligation is inherent, notwithstanding the fact that the traffic on the railroad may increase or decrease.

In this particular case there are two very important conditions which must be given full consideration: One, the elimination of existing hazards on this viaduct, and the other, the adequacy of the structure to carry traffic. *There is no question but that the railroad has a direct obligation to assist in the elimination of hazards. The widening of the structure becomes necessary to meet the increased traffic conditions on the highway* and not as a result of a changed character or volume of the railroad situation; *consequently the benefits from such widening accrue largely to the vehicular public.*" (Emphasis added).

The Commission accordingly ordered that the railroad should pay $75,000, as its contribution to a total estimated cost of $266,000.

In a companion decision rendered about two months later: Decision No. 25069, *Application of the City of Los Angeles* (August 15, 1932), 37 C.R.C. 784, question was again raised as to the railroad company's contribution toward the widening and improvement of an existing grade separation. Again the point of lack of benefit to the railroad company was argued. The Commission's comment, couched in language approximating what it had said in the earlier *San Bernardino case*, was as follows (at pp. 786-787):

> "The matter of direct financial benefits is not the sole test in the determination of the respective portions which the railroad and public should contribute toward the cost of such improvement. *In apportioning the cost of constructing these separations between applicant and the railroad company, due consideration should be given to the obligations of each party, as well as to the benefits derived.* It should be recognized that the railroad has a continual obligation to participate in the matter of constructing and maintaining reasonable and adequate crossings over its tracks both at grade and at separated grades. This obligation is inherent, notwithstanding the fact that the traffic on the railroad may increase or decrease.
>
> *There can be no question that the vehicular public will receive the greatest benefit from the widening of these separations, so it logically follows that this class of the public should bear the greater portion of the cost.*" (Emphasis added).

Accordingly, the railroad was required to bear 25% of the cost of the project, subject to the condition that if the roadway were widened, and excess costs were thereby incurred, the railroad should not be required to bear any portion of such excess.

It will be observed that in these two decisions the Commission did not by any means reject completely the benefit principle. In both cases it was recognized that the benefits accrued largely to the "vehicular public" and, as stated in the *Los Angeles* decision (No. 25000), it followed that this class of the public should bear the greater portion of the cost.

Nevertheless, the so-called "barrier concept" was given weight as justifying the assessment of a portion of the cost against the railroad company, irrespective of benefit. This concept may be stated somewhat as follows:

The railroad, by its very presence across the roadway, presents a barrier to economic and social development of the area of a crossing, a barrier to maximum development of land areas beyond the crossing, and a barrier to the free flow of traffic across its own right of way. Since on this basis it is held that the railroad has been the aggressor in preventing the free and unhampered use of the public thoroughfare, it is, by the same token, responsible for a substantial share of the cost of improving, and eventually eliminating, such crossings.

From the practical standpoint there are two obvious defects inherent in the "barrier" concept. In the first place, the fundamental premises are not substantially correct. A railroad is an important aid, rather than a barrier, to economic and social development in the area which it serves. To insist that the railroad is a barrier is to argue that it should be entirely relocated, not merely that crossings should be eliminated, or that a railroad should contribute greater amounts or proportions toward the construction of improvements. In the second place, the barrier concept

standing by itself presents no basis whatever upon which to distribute costs as between the railroad and the public. When the barrier concept is controlling, the result is to substitute the individual and variable views and opinions of the successive members of the Commission who may become charged with the responsibility for its decisions, in place of the definite and reasonably precise economic considerations which ought to govern in determining cost allocations.

It is important therefore to note that in the period commencing in and following 1933, the Commission gave but little weight to the barrier concept and instead, in practically all cases in which the issue was raised, allocated costs of grade separations primarily upon the basis of *actual benefit*, particularly insofar as concerned contributions of the interested railroads. The leading decision stating this policy was No. 25551, rendered in the so-called *Goshen case: Application of the Department of Public Works* (January 16, 1933), 38 C.R.C. 380, in which the Commission said (at p. 386):

> "In allocating the costs here we are departing from the practice which has obtained generally heretofore of assessing one-half to each the public and the railroad in case of an existing grade crossing. While this procedure has appeared equitable in the past, the tremendous changes in transportation conditions make necessary a reappraisement of the liabilities of the two parties at interest. The railroad still continues to be the aggressor in preventing the free and unhampered use of the public thoroughfare, but the needs of the traffic on the highway have not only increased and changed in nature, but the use of the highway has become in large measure directly competitive with the

rail line. These and incidental conditions following them have changed the benefits flowing from the separation of grades between these two great avenues of traffic.

"After carefully considering all the evidence in these proceedings, it is concluded that the order should authorize the grade separation, as proposed, and fix the amount to be contributed by the railroad in a lump sum based upon direct and indirect benefits. This sum is arrived at by capitalizing an amount measuring the annual benefits and privileges on a 6 per cent basis. If applicant elects to proceed with the construction of the separation, where according to the record there is some question as to its present economic justification, it shall bear the remainder of the cost and choose the width of subway it desires to construct."

Subsequently, in the same year the Commission in several decisions adhered to the benefit principle:

Decision No. 25588, *Application of Department of Public Works (Madrone Underpass)* (January 30, 1933), 38 C.R.C. 425;

Decision No. 25811, *Application of Department of Public Works (Alto Overpass, etc.)* (April 10, 1933), 38 C.R.C. 606;

Decision No. 25812, *Application of Department of Public Works (El Monte Underpass)* (April 10, 1933), 38 C.R.C. 612.

In Decision No. 25811, where it was shown that there was no substantial public necessity for the crossings other than the saving in time to motor traffic, and certain minor operating savings to the railroad, the Commission held that the

barrier exception had no application, and that the railroad company should make no contribution at all on that basis, or to any extent beyond its own direct benefits. Specifically the Commission said (38 C.R.C., at pp. 611-612):

> "In passing upon the above matters, consideration has been given to the fact that in each case the separation was a part of a highway change made primarily to benefit the users of the highway in the way of decreasing the length of travel and improving the grades and alignment of the highway. Economic studies introduced in these proceedings show that the vehicular traffic on the highway has materially benefited through these expenditures. On the other hand the railroad has been benefited to the extent shown above. It is recognized that the railroad must expect to permit highway development by admitting the construction of new highways over its tracks. In these cases the railroad has in each instance authorized and permitted applicant to proceed with the work but takes the position that it should not be required to participate in the expense of constructing the various separations beyond its direct benefits. *In none of the above matters has there been shown any public necessity for the improvement aside from the economic saving accruing to the traffic on the highway* and operating savings to the railroad. *Passage to the public across the railroad was adequately provided without these separations. For these reasons no costs have been imposed upon the railroad because it stood as a barrier* to the new highway alignment." (Emphasis added.)

It is petitioner's position here that the Commission's own quoted statement is particularly applicable in this case, in that the only public necessity asserted or which could be shown is the elimination of delays to highway traffic, and it

particularly appears that safe passage of that traffic (subject of course to delays) is now provided, *without* the proposed separation. We emphasize that the petitioner is here seeking nothing more than the fair application of the principles stated by the Commission in the excerpt last quoted.

To show the continuing application of the benefit principle in this state, in the years subsequent to and including 1933, we attach as Exhibit G, pp. 92-97 of the Appendix a statement listing the grade separations in this state to which petitioner and its affiliated companies operating steam railroads (i.e., the Northwestern Pacific, and the San Diego and Arizona Eastern), have been parties. This statement shows each of the separations by location, year of construction, overall cost, and actual or percentage contribution of the railroad. It will be noted also that each separation was duly authorized by an order of the Commission, the number of which is shown; and that in each case the cost allocation was either prescribed, or (in case of prior agreement of the parties) approved, by the Commission. It may be noted that the overall cost of these separations was slightly more than $22,000,000.

It is significant that in the vast majority of the separations listed the railroad contributed nothing at all; the parties having apparently agreed that it had no responsibility, would receive no benefit, and hence should not be required to participate. This was notably true in those cases where the public authorities were the moving parties, and were undertaking to construct a new or alternate roadway across an existing railroad. In two cases where the railroad was itself the moving party (Nichols and Russ-

Lang), the railroad agreed to assume the entire cost. In those few cases where the parties did not agree in advance, the apportionment is shown to have been on the benefit basis, with, generally, the railroad's apportionment limited to either a fixed maximum, or a small percentage.

Bases of Apportionment Followed Nationally and in Other States

The Commission's refusal in the present case (and in the recent and still pending case involving the Santa Fe, above referred to) to apply the benefit principle in determining the railroad's contributions, thus constitutes a reversal of the trend of thinking and practice in this State, prevailing since 1933, and sanctioned and approved by the United States Supreme Court in the *Walters decision*, supra. The Commission has undertaken to return to an earlier concept which (though at one time having some apparent logical basis) is no longer responsive to present-day realities.

To demonstrate how far the prevailing view has moved away from the "barrier" concept, we have prepared, and attach as Exhibit H of the Appendix an analysis of the legislative provisions and actual practices currently existing in the various states in relation to this subject matter. For convenience we here summarize the more significant features disclosed by the analysis:

(1) There exist in a number of states legislative limits upon the amount that can be assessed against the railroad in highway-railroad grade-separation projects;

(2) In many states that limit is established at considerably less than 50 percent, being not more than 10 percent in some;

(3) In numerous states the allocation is made by regulatory authority or other state agency, based upon the individual project;

(4) In only 14 states is the allocation based upon a fixed formula of 50 percent or more to the railroad;

(5) Among those states fixing a maximum allocation to the railroads of 15 percent or less are the highly industrial and populous states of Michigan, New Jersey, New York, and Ohio;

(6) In West Virginia and New Mexico, the latter a sparsely populated state, with relatively small industrial stature, and limited funds from highway user taxes, the maximum allocation of cost to the railroads on grade-separation projects is only 10 percent;

(7) Wherever in any state any federal funds are used, even in part, the maximum allocation to the railroads is 10 percent, under federal law, and irrespective of state law or practice.

In an authoritative study prepared by the Stanford Research Institute, dated May 1, 1952, and entitled, "The Railway-Highway Grade Crossing Problem," the following observations are made with respect to the trends of state legislative enactments dealing with the disposition of costs for railroad-highway grade crossing improvement (at p. 47):

> "Since the 1880's state legislatures and city councils in all parts of the nation have passed laws governing the distribution of costs for grade crossing improvements and eliminations. All except a few states now have statutes providing for either a fixed-percentage

distribution of cost between the railroads and the public, or the vesting of power to fix cost distribution in a state commission or department. There is no substantial similarity among state laws in the distribution of costs, nor in the bases of allocation used by state commissions or departments in distributing such costs. In several states distribution of costs is made on the basis of agreements reached between the railroad and the responsible public authority.

There have been two significant tendencies in development of state laws governing distribution of costs for grade crossing improvements. First, there has been a tendency over the years for the percentage of the total cost allocated to the railroads to decrease. Second, there has been an increasing tendency for state laws to specify the principle that costs for construction of grade crossing eliminations should be distributed among beneficiaries on the basis of the relative benefits derived from the elimination."

The benefit principle has received the specific approval of Congress in enacting legislation in furtherance of highway construction, as shown by Section 5 (b) of the Federal-Aid Highway Act of 1944 (58 Stat. L. 838, 841):

"(b) Any railway involved in any project for the elimination of hazards of railway-highway crossings paid for in whole or in part from funds made available under this Act, shall be liable to the United States for a sum bearing the same ratio to the net benefits received by such railway from such project that the Federal funds expended on such project bear to the total cost of such project. For the purposes of this subsection, the net benefits received by a railway from any such project shall be deemed to be the amount by which the reasonable value of the total benefits re-

ceived by it from such project exceeds the amount paid by it (including the reasonable value of any property rights contributed by it) toward the cost of such project; and in no case shall the total benefits to any railway or railways be deemed to have a reasonable value in excess of 10 per centum of the cost of any such project."*

Following the policy set forth in the Federal-Aid Highway Acts, the United States Bureau of Public Roads issued in 1948 its General Administrative Memorandum No. 325, which sets forth principles governing the cost responsibility of railroads for grade-crossing improvements and eliminations financed in whole or in part by federal funds. This memorandum provides that:

1. When principal grade crossings are closed by the completion of a grade separation, the railroad shall be deemed benefited and shall contribute 10 percent of the total cost of the project.
2. The railroad shall not be deemed benefited nor required to contribute toward the replacements, widening, or strengthening of existing railway-highway grade separations.
3. When automatic signal devices are provided for grade crossings as a matter of increased protection, the railroads shall contribute 10 percent of the total cost of the project as representing the value of railroad benefits.
4. No benefits will be considered as accruing to the railroads, and no railroad contributions will be required, when protective devices or grade separa-

*This section is still in effect, having been extended in 1948 (62 Stat. L. 1105), and again in 1950 and 1952 by the Federal Aid Highway Acts of those years. (Public Law 413, 82nd Congress, enacted June 25, 1952).

> tions are provided as a result of a new street or highway (not a relocation) intersecting an existing railway track. When a new railway track intersects an existing street or highway, the cost of a grade separation or protective devices shall be considered as being entirely for the benefit of the railroad, and it shall stand the total cost of the project.

It may be noted, in passing, that in the principal decision here challenged, the Commission has undertaken to find, contrary to the evidence bearing directly on the issue, that the proposed construction does not concern a state highway, and accordingly the Department of Public Works of the State is not directly involved. (See p. 13 of the opinion: p. 32 of the Appendix. This finding is directly contrary to the undisputed testimony of the Principal Traffic Engineer of the City of Los Angeles, who pointed out that stoppage of traffic at the Los Feliz grade crossing created a "back-lash" which affected the traffic and thus caused congestion on San Fernando Road (U.S. 99), as well as the testimony of the Assistant District Traffic Engineer of the State Division of Highways, who admitted that such effects occasionally took place, though in his opinion they were of minor consequence. It is suggested that the Commission made its finding, in the face of this positive testimony, in order to avoid any possibility that the State Department of Public Works might be called upon to contribute; since in that event, federal funds being potentially involved, the contribution to the railroad might have to be limited to 10 percent of the allocable cost.

As already pointed out, the Commission in its principal decision here under challenge has incorporated by reference

its holding in Decision No. 47344, the so-called *Washington Boulevard case*, to the effect that it is not bound to follow the benefit theory, but may allocate costs in the exercise of the police power delegated it by Section 1202 of the Public Utilities Code; and has quoted as the authorities supporting this conclusion four decisions of the United States Supreme Court. Those decisions are:

Chi., Mil. & St. P. Ry. Co. v. Minneapolis (1914), 232 U. S. 430, 58 L. ed. 671;

Mo. Pac. Ry. Co. v. Omaha (1914), 235 U. S. 121, 59 L. ed. 157;

Erie R. Co. v. Public Utility Commissioners (1920), 254 U.S. 394, 65 L. ed. 322;

Lehigh Valley R. Co. v. Public Utility Commissioners (1928), 278 U.S. 24, 73 L. ed. 161.

It will be observed that each of these cases was decided prior to the *Walters case, supra* (March 4, 1935); furthermore, that neither in Decision No. 47344, nor in No. 47420, here challenged, did the Commission cite or refer to the *Walters case*, or make any attempt to distinguish that case from either of the cases before the Commission.

The *Minneapolis case*, decided February 24, 1914, had to do with the allocation of the expense of building a bridge required to carry the railroad company's tracks over a canal or waterway being constructed by the City to connect certain lakes in a public park then being developed. Relying upon earlier cases, in which the *dangers* inherent in railroad grade crossings were principally referred to, the Court held that the railroad company might be required, at its own expense, to build and maintain a suitable overpass to carry its tracks over a public highway, even though that public

highway might be a waterway instead of a roadway. Unquestionably this case, if it had not been qualified by later decisions of the same Court, would be an authority supporting the Commission's position. However, in the light of later decisions, and more especially the vast change in conditions since 1914, obviously this decision can no longer be regarded as the sole controlling authority.

The *Omaha case*, decided November 30, 1914, presented the question of the power of the city to require the railroad company to build a highway overpass, sufficient to carry not only the ordinary traffic of the street, but also the tracks and vehicles of a street-railway company; the provision for the latter having increased the cost from $50,000 to about $80,000. Throughout the opinion of the Court, emphasis was laid upon the exercise of the police power by the city, in the *interest of public safety;* and indeed it may be said of the decision that it is predicated almost entirely upon safety considerations. Thus the Court said (235 U. S. at p. 129):

> "The broad authority to require any railroad company to make such improvement, in the interest of *public safety*, is conferred by the legislature upon the city. The *safety of the travelling public is the primary consideration*. . . . The public when being transported by the street railway company was exposed to the *dangers* of a grade crossing, which it was within the authority of the State to authorize the municipality to discontinue." (Emphasis added.)

In the *Erie case* the question was as to the power of the New Jersey Board of Public Utility Commissioners to require the Erie Railroad to construct a number of grade separations in the City of Paterson. In this case again,

the Court's action in sustaining the imposition of cost upon the railroad was predicated almost entirely upon safety considerations. Thus, it was said (254 U.S., p. 410, 411):

> "the State . . . has a constitutional right to insist that they (railroad-highway crossings) shall not be made *dangerous* to the public, whatever may be the cost to the parties introducing the *danger*. That is one of the most obvious cases of the police power, or, to put the same proposition in another form, the authority of the railroads to project their moving masses across thoroughfares must be taken to be subject to the implied limitation that it may be cut down *whenever and so far as the safety of the public requires . . . If it reasonably can be said that safety requires the change* it is for them (the states) to say whether they will insist upon it. . . . To engage in interstate commerce the railroad must get on to the land and to get on to it must comply with *the conditions imposed by the state for the safety of its citizens.*" (Emphasis added.)

The Court also said (at p. 412):

> ". . . If we could see that the evidence plainly did not warrant a finding that the particular crossings were *dangerous* there might be room for the argument that the order was so unreasonable as to be void. *The number of accidents* shown was small and if we went upon that alone we well might hesitate. But *the situation is one that always is dangerous.* The board must be supposed to have known the locality and to have had an advantage similar to that of a judge who sees and hears the witnesses. The courts of the state have confirmed its judgment. The tribunals were not bound to await a collision that might cost the road a sum comparable to the cost of the change. If they were reasonably warranted in their conclusion their judgment must stand." (Emphasis added.)

In the *Lehigh Valley case* the principal question was whether the railroad might be required to pay for the construction of an overpass, the particular question being whether an order requiring an expenditure of $324,000 was reasonable, when it appeared that an adequate though less desirable crossing might have been constructed for about $100,000 less.

Again the Court emphasized safety considerations as the primary basis for the exercise of the police power to require construction of grade separations. Thus the Court said (at p. 34):

> "A railroad company in maintaining a path of travel and transportation across a state, with frequent trains of rapidity and great momentum, *must resort to reasonable precaution to avoid danger to the public.* This court has said that where railroad companies occupy lands in the state for use in commerce, *the state has a constitutional right to insist that a highway crossing shall not be dangerous to the public,* and that where reasonable safety of the public requires abolition of grade crossings, the railroad can not prevent the exercise of the police power to this end by the excuse that such change would interfere with interstate commerce or lead to the bankruptcy of the railroad."

After citing the *Erie case, supra,* the Court continued:

> *"If the danger is clear,* reasonable care must be taken to eliminate it and the police power may be exerted to that end. *But it becomes the duty of the court, where the cost is questioned, to determine whether it is within reasonable limits."* (Emphasis added.)

There are two distinct, and equally adequate reasons why these cases cannot be considered as supporting the conclusions of the Commission in the decision here challenged,

and it follows that the Commission erred in relying upon them. The first reason is that the cases obviously do not embody the final expressions of the views of the Court in relation to the facts of today. All of these cases were before that Court when it rendered its decision in the *Walters case*. Each of them was cited to it by the appellees in their effort to sustain the ruling of the State Supreme Court (see 294 U. S., at pp. 410, 411, where the argument on behalf of the State of Tennessee is summarized); and each of them is referred to in the text of the Court's opinion (294 U. S., at p. 415, and also pp. 430, 431, where the citations of these and other cases are repeated).

The second reason is that in each of the four cases relied upon by the Commission, and particularly in the *Omaha*, *Erie* and *Lehigh Valley cases*, the primary emphasis of the Court was upon safety considerations: i.e., the elimination of hazard to the public. Safety considerations were stressed again and again, as the above excerpts show, as being the primary factor supporting the exercise of the State's police power. In the instant case, on the other hand, the alleged need for greater safety of the public at the crossing is not relied upon at all, by either the parties who have proposed the separation, or the Commission itself in its decision here challenged; and in fact, the record demonstrates conclusively that public safety at the crossing is already adequately provided. The entire emphasis throughout this proceeding, and notably in the Commission's decision, has been upon *convenience to automotive traffic* on Los Feliz, and generally upon the network of highways of which it forms a part. Compare the references in the decision to the fact that Los Feliz has reached its capacity and is now carrying an overload; to the traffic checks made at the crossing and

the delay to vehicles resulting from the passage of trains; to the stoppage of traffic at the crossing upon such occasions, and the resulting "back-lash" affecting traffic at the nearby crossing of San Fernando road; and finally the Commission's own conclusions (p. 14 of the decision; Appendix, p. 33) that the evidence shows that the great increase in vehicular service is one reason for constructing "a grade separation", the clear intendment of the comment being that such increase was the obvious and controlling reason for this proposal.

As contrasted with these repeated references to the *convenience* or, on the other hand, *delay* to automotive traffic, there is virtually no mention in the opinion of the Commission of any safety consideration. There is, of course, a formal finding (at p. 13; Appendix, p. 32) that the construction will be in the interest of public safety, convenience, and necessity, but this reference to safety stands practically alone in the opinion. The only other reference, even by inference, to safety matters is found in the summary of that portion of Exhibit 2 which is directed to the economic justification for the separation, and where an item reporting the "annual accident damages" paid by the railroad is included. It appears that the average annual cost for the twenty-five years covered by the study was $475, which shows that at Los Feliz crossing serious accidents almost never occur. This conclusion is borne out by Exhibit 2 itself (at pp. 28, 30) where it is shown that only fourteen accidents occurred at the crossing, in a period of more than 25 years, and that only ten personal casualties were involved.

It is clear that this is a case where safety considerations cannot possibly be relied upon as justifying the separation,

and that the Commission has made no attempt to rely upon them. Obviously an expenditure such as here contemplated, of practically one and one-half million dollars, would not be warranted in the interest of eliminating minor accidents occurring at the rate of about one each two years, or personal injuries at the rate of about one every three years; and it follows that the Commission erred in relying here upon decisions of the Supreme Court of United States in which accident elimination and safety considerations formed the principal basis for its approval of state action imposing upon the railroads the major portion of the cost of grade-crossing separations, because such decisions are not in point or even persuasive.

The Commission's citation of these decisions demonstrates indeed the completely arbitrary character of its approach to the fundamental questions presented in this case, and warrants the conclusion that it was determined, regardless of controlling authority, to reject the benefit principle and revert to the mere rule-of-thumb method of allocations often followed before the benefit principle had been evolved and accepted.

Under the decision in the *Walters case*, the Commission's action in assessing half of the cost against petitioner, without regard to the benefit principle, clearly constituted a violation of petitioner's rights under the due-process clause of the Federal Constitution. The Commission, in short, erred in much the same manner as the Supreme Court of Tennessee, whose judgment was reversed in that case, in that the Commission here refused "to consider whether the facts relied upon by the railway established as arbitrary and unreasonable the imposition upon it of one-half the cost of the underpass."

Particularly significant in this connection is the comment of the United States Supreme Court already quoted from the *Walters* opinion that the promotion of public *convenience* (the sole primary end sought in the case at bar) will not justify requiring the expenditure of money by a railroad, any more than by others, unless it can be shown that a duty to provide the particular *convenience* rests upon it. In the present case, *safety* having been adequately assured, no particular *duty* rests upon the petitioner to provide a more *rapid* or *convenient* roadway for the "vehicular public".

Moreover, since the due-process clause of the Constitution of this State is framed in language substantially identical to the Fourteenth Amendment, the principle of the *Walters case* equally establishes that petitioner's rights under the State Constitution are likewise infringed.

In the above specifications of errors it is also asserted that the Commission's action here imposes an undue burden upon interstate commerce, in violation of the Commerce Clause of the Federal Constitution, and the national transportation policy set forth in the preamble to the Interstate Commerce Act as amended in 1940. Controlling decisions of the United States Supreme Court make it clear that action by a state agency which results in the imposition of a direct and substantial burden of expense upon an interstate commerce carrier will, if not otherwise justified, be held to constitute a burden upon interstate commerce and as such, an infringement of the Commerce Clause.

In

Kansas City Southern Ry. Co. v. Kaw Valley Drainage District (1914), 233 U.S. 75, 58 L. ed. 857,

it was held that an order by a state agency for the removal of a railroad bridge across a navigable stream was a direct

interference with commerce and therefore invalid; this even though the understood purpose of the order was actually to compel the railroad to elevate its bridge, with the approaching tracks, so as to lessen the danger of floods. The Court held that this direct interference with and regulation of a subject matter committed by the Constitution to the exclusive control of Congress could not be avoided by the State,

> "by simply invoking the convenient apologetics of the police power. It repeatedly has been said or implied that a direct interference with commerce among the States could not be justified in this way. 'The state can do nothing which will directly burden or impede the interstate traffic of the company, or impair the usefulness of its facilities for such traffic.' (Citing cases) . . . Furthermore *in the present case it is not pretended that local welfare needs the removal of the defendants' bridges* at the expense of the dominant requirements of commerce with other states, *but merely that it would be helped by raising them.* The fact that the court cannot order them to be raised does not justify a judgment that they be destroyed even in the avowed expectation that what it wants but cannot command is all that will come to pass." (Emphasis added.)

In

St. Louis & San Francisco Ry. Co. v. Public Service Comm. (1921) 254 U.S. 535, 65 L. ed. 389,

the Supreme Court held invalid an order of the Missouri Public Service Commission requiring the railway to reroute two of its through mainline passenger trains, so as to serve directly an intermediate city of about 4,000. It was shown that that city was already served by some seven daily trains

each way, some of which made connections with through trains at a nearby junction. The order was challenged as a direct interference with and burden upon interstate commerce, in violation of the Commerce Clause. The Court said (p. 537):

> "Considering the facts disclosed, we think it plain that the fourteen local passenger trains meet the reasonable requirements of Carruthersville, and that the Commission's order unduly burdens interstate commerce. Compliance with it would require the railway to maintain 16 more miles of track at the high standard essential for the through trains, and to move the latter 10 miles further, with consequent delay and inconveniences all along the line. The burden certainly would not be less serious than those which were condemned in some, if not all, of the causes above referred to."

In

Southern Pacific Co. v. Arizona (1945), 325 U.S. 761, 89 L. ed. 1915,

the Supreme Court held invalid, as a violation of the Commerce Clause, the Arizona statute forbidding the operation in that State of freight trains of more than 70 cars, or passenger trains of more than 14 cars. It was shown that there was not only a physical interference with the operation, in the sense that more trains were operated than would have been otherwise required, but also that the direct expense of compliance with the statute was considerable, amounting in fact for the two principal railroads traversing Arizona (the present petitioner, and the Santa Fe) to about $1,000,000 per year. Referring to this and the other effects of the law, the Supreme Court said (at p. 773):

"The unchallenged findings leave no doubt that the Arizona Train Limit Law imposes a serious burden on the interstate commerce conducted by appellant."

After citing various cases holding that a state may not interfere with or regulate interstate commerce so as substantially to affect its flow, including both the *Kansas City Southern*, and *St. Louis & San Francisco R. Co. cases, supra*, as well as many others, the Court concluded (pp. 781-782):

"Here we conclude that the state does go too far. Its regulation of train lengths, admittedly obstructive to interstate train operation, *and having a seriously adverse effect on transportation efficiency and economy*, passes beyond what is plainly essential for safety since it does not appear that it will lessen rather than increase the danger of accident." (Emphasis added).

It is here undisputed that petitioner is a common carrier in interstate commerce, and that its line crossing Los Feliz is a portion of one of its main routes used in such commerce. The additional burden of capital expense imposed upon petitioner by the Commission's decision, if the same is allowed to stand, amounts to $627,260, the difference between $746,600, representing 50% of the total allocated cost of the separation, and $118,340, the capitalized equivalent of the annual net benefit of $5,917, accruing to petitioner from the separation. These several amounts (other than the difference, obtained by mere subtraction) are set forth in the Commission's decisions under review, and are not disputed.

It cannot be questioned that the imposition of an unjustified capital expenditure of more than $600,000 has a seriously adverse effect upon the *efficiency* and *economy* of petitioner's operations; and certainly in this case this

expenditure is not in any sense "essential for safety", inasmuch as the undisputed record shows that virtually no safety problem is presented at the Los Felix crossing, and that the proposed separation is not even pretended to be necessary in the interest of safety.

The amount here at stake apparently is comparable to that involved in the *Kansas City Southern Case*, and perhaps somewhat greater than in the *St. Louis & San Francisco Case*. It is of course less than the approximate half-million dollars per year of the *Arizona Case*. Nevertheless, the principle is not governed solely by the amount involved. Any substantial imposition for which no reasonable basis is shown is a burden upon commerce and as such is invalid.

In the *Erie Case, supra* (254 U. S. 394, 410-411), the court included the following comment:

> "If it reasonably can be said that safety requires the change, it is for them (the states) to say whether they will insist upon it, • • • If the burdens imposed are so great that the road cannot be run at a profit, it can stop, whatever the misfortunes the stopping may produce."

After the *Erie case*, the railroads (with the authority of the Interstate Commerce Commission) did in fact abandon much of their unprofitable mileage, particularly of branch lines. In many instances, the railroads actually abandoned lines rather than pay the enormous costs involved in grade separations. With this background in mind, the reasons for the adoption of the National Transportation Policy in 1940 can be more readily understood. The Act of September 18, 1940, Chap. 722, Title I, Sec. I, 54 Stat. 899, amended the Interstate Commerce Act by inserting before Part I thereof

the following provision entitled "National Transportation Policy":

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; *to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers;* to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—*all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense.* All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." (Emphasis added.)

Thus this Court is faced with a specific *change* in policy, adopted in view of the existing body of the law, which includes of course the *Erie case.* Petitioner submits that it is no longer the doctrine of this government that a railroad may quit if it cannot meet the high cost of grade separations where a large proportion of the costs are allocated to the railroad. On the other hand, Congress has stated it to be the policy of the government to *preserve* a national trans-

portation system by rail to meet the needs of commerce of the United States, of the Postal Service, and of the national defense. It is further provided in the National Transportation Policy that it should be recognized that the transportation services promoted should be economical, and that sound economical conditions in transportation should be fostered.

The Supreme Court of the United States, in *Schwabacher v. U.S.* (1948), 334 U.S. 182, 92 L.ed. 1305, said of the National Transportation Policy:

> "* * * This Court has recently and unanimously said in reference to this Act, 'Congress has long made the maintenance and development of an *economical* and *efficient* railroad system a matter of primary national concern. Its legislation must be read with this purpose in mind.' Seaboard Air Line R. Co. v. Daniel, 333 U.S. 118, *ante*, 580, 68 S.Ct. 426." (Emphasis added.)

See also:

Interstate Commerce Commission v. Parker (1945), 326 U.S. 60, 89 L.Ed. 2051.

The Commission's action in the present case must be considered in connection with other grade separation projects not only in California, but also other states. The petitioner operates in seven Western states, including California, and is called upon by these states and their political subdivisions to contribute toward grade-separation construction. Reports of the Commission disclose that in California alone it would cost two and one-half billion dollars to separate all the grade crossings in the state. The Southern Pacific is being called upon to contribute toward the construction of numerous such projects. It is reasonable to conclude that as auto-

mobile and truck registrations mount and highway construction doubles and trebles as it has in recent years and, as motorists chafe at delay, the pressure for new grade separations will increase. It is also apparent that tremendous burdens will be cast upon the railroads if by some arbitrary formula unrelated to benefits they are compelled to contribute 50% or more of the costs of building these new and expensive separations. The imposition of such charges, without regard to benefit, will constitute intolerable burdens upon interstate commerce. The decisions in *Penn. Railroad Co. v. Driscoll*, 188 Atl. 130, 9 A.2d 621, [illegible], stand for the proposition that if the costs of compliance with the legislative mandate are arbitrary, and unreasonably oppressive, then the mandate is void.

In the light of the *Arizona Case*, and the other decisions cited, this Court should hold that the challenged order places a direct and unwarranted burden upon interstate commerce, and is therefore void as an infringement of the Commerce Clause.

II.

BECAUSE OF ALLOCATING SUCH EXCESSIVE AND UNRELATED COSTS TO BE PAID BY PETITIONER, THE COMMISSION'S ORDER IF ENFORCED WOULD REQUIRE PETITIONER TO DISCRIMINATE AGAINST ITS CUSTOMERS, AND TO INJURE ITS OWN BUSINESS CORRESPONDINGLY.

This section relates to both passenger vehicles and trucks, at both the proposed separation on Los Feliz and the intersection of Los Feliz and San Fernando Road.

The uncontradicted evidence is that Los Feliz is a major traffic artery on the master plan of highways of the County

of Los Angeles, the City of Los Angeles and the City of Glendale, and has always been considered a place where traffic of major importance to the metropolitan area will flow in increasing volume. (Rep. Tr. p. 23, l. 14-20). A substantial volume of vehicular traffic that originates or terminates in the metropolitan area of Los Angeles uses Los Feliz enroute to Antelope Valley, and also the Palm Springs area (Rep. Tr. p. 30, l. 9-18). Los Feliz is also used to reach U. S. Highway 99 and State Route 40, leading to the interior valleys (San Joaquin and Sacramento Valleys) in California (Rep. Tr. p. 30, l. 9-18) and the San Francisco Bay area.

Many changes now in progress, and other contemplated additions to the highway system in the Los Angeles area, will increase the flow of traffic across Los Feliz. The Principal Traffic Engineer of the City of Los Angeles pointed out that there are many things transpiring at present that will increase the vehicular use of Los Feliz (Rep. Tr. p. 185, l. 7-26). These matters include, (1) change of traffic trends due to the completion of the Hollywood Freeway (a state highway), (2) the building of the Riverside Freeway (a state highway), (3) the widening of Franklin and Western Avenues in the City of Los Angeles, several miles distant from Los Feliz crossing, which avenues are presently bottlenecks. These avenues constitute a by-pass, and their widening will remove physical restrictions on traffic from the west, the beaches, and the north, to flow through Glendale over Los Feliz (Rep. Tr. p. 196). This new construction in the City of Los Angeles will also divert to Los Feliz traffic now using other crossings of the railroads (Rep. Tr.,

p. 197). All of this new construction, and widening of other highways, will result in additional vehicular traffic on Los Feliz, and increase blocking at the intersection of Los Feliz and San Fernando Road. It is obvious that a separation at Los Feliz will be of benefit to this vehicular traffic that is being diverted to Los Feliz, but of no benefit to the petitioner.

This use of Los Feliz by vehicular traffic going to points served by passenger and freight service of the petitioner Southern Pacific Company in the Palm Springs area, the Antelope Valley, the San Joaquin and Sacramento Valleys, and the San Francisco Bay area, is such that if petitioner is called on to pay for the cost of construction any greater sum than the benefit that accrues to petitioner, it will be subsidizing the persons who compete with petitioner, and the traffic moving over these competitive highway routes.

At present a great number of trucks use Los Feliz crossing. In Exhibit 2 it was developed that during a typical week 589 trucks (in addition to an undetermined number of panel trucks) were delayed at the crossing (see also Exhibit 4, which disclosed substantially the same delay). Observations on two typical week days disclosed that an average of 1,017.5 tank trucks, truck and trailer combinations, and other trucks used the Los Feliz crossing daily. These calculations exclude light panel trucks.

The development of a constantly expanding highway system has resulted in the continuous building-up of a highway transportation industry that is highly competitive with the petitioner as well as other railroads. This competition has taken away from the railroads their one-time virtual mo-

nopoly of the heavy, long-haul transportation field, and reduced their revenues proportionately. Any further improvement of the highway system in which Los Feliz is included will merely intensify the competition by improving the facilities made available to petitioner's competitors. The trucks, using Los Feliz (Rep. Tr. p. 28, l. 22-24) will not only themselves be benefited by the separation, but the benefit will extend to the trucks using San Fernando Road, (U.S. 99), located about 850 feet to the east and parallel to the railroad (Rep. Tr. 181). The record shows that when the crossing gates are down at Los Feliz, automobiles and trucks are backed up into the intersection at Los Feliz and San Fernando Road (Rep. Tr. p. 172), so as to cause a backlash and substantial delay (Rep. Tr. pp. 179-180, 186). San Fernando Road is the main truck artery leading from metropolitan Los Angeles to the Ridge Route, the San Joaquin and Sacramento Valleys, and the San Francisco Bay Region. To paraphrase the Court's comments in the *Walters case, supra*, when the separation is completed the trucks and passenger vehicles will be in a still better competitive position, at no expense to themselves, but at the substantial expense of the railroad.

The Principal Traffic Engineer of the City of Los Angeles testified:

> "Q. In other words, the benefits to Glendale of a grade separation would be the elimination of the blocking at San Fernando Road; that is the principal additional benefits you think Glendale gets from the grade separation? A. Yes, and I think the State gets it because of the increased volume of traffic that they are able to move on San Fernando Road." (Rep. Tr. p. 191).

The Planning Director of the City of Glendale testified:

"Q. Will you explain the relationship of the grade crossing to San Fernando Road? A. The crossing is approximately 850 feet southwest of and at right angles, measure at right angles to the tracks from the railroad right of way. That situation is indeed serious from the standpoint of an arterial highway such as San Fernando Road and the effect that it has on the general movement of traffic in the neighborhood. Crews (Queues) of *traffic a quarter of a mile long have stacked up on each side of the Los Feliz grade separation, with the result that San Fernando Road, a State and Federal highway, have had the traffic blocked*—the congestion being felt not on Los Feliz alone but on the north and south traffic along San Fernando Road to such an extent that you can find congestion periods during peak hours three-quarters of a mile or more along San Fernando Road that are having trouble getting through. Not all of that, of course, can be attributed to the crossing, but a substantial portion of it. Anyone who has had the misfortune to be blocked behind even a momentary delay on San Fernando Road will realize that large volumes of traffic, the load on San Fernando Road is around thirty to forty-five thousand cars a day, only a momentary delay will create a long queue of congestion on the State Highway.

"Q. Occasionally, you said, the traffic backs up from the grade crossing to and across San Fernando Road?

"A. That is correct. There are signals there, but even the signals do not entirely clear the intersection at times of severe congestion." (Rep. Tr. pp. 69-70).

Exhibit 9 was introduced by the State of California, Department of Public Works, Division of Highways, to minimize the effect of delays to traffic at Los Feliz crossing upon

the intersection of Los Feliz and San Fernando. This exhibit covered only a two-day check. The statement of State Highway Department witness was:

> "It is concluded that train movements across existing crossings do affect San Fernando Road traffic on occasions. These conditions are not regular in occurrence and are usually minor in effect."

The above evidence did not consider the effects as described by the other eye witness, nor did it take into account the new traffic which will be diverted into Los Feliz, as described by the Principal Traffic Engineer for Los Angeles.

In the light of the situation thus described by the witness, and apparently accepted by the Commission as being correctly stated, it is appropriate to refer to certain comments of the Court in the *Walters Case*, already quoted, but here again repeated because of their particular bearing:

> "The effect upon the railroad of constructing Federal-aid highways, like that here in question, is entirely different. They are not feeders of rail traffic. They deplete the existing rail traffic and the revenues of the railroads. Separation of grades serves to intensify the motor competition and to further deplete rail traffic. The avoidance thereby made possible of traffic interruptions incident to crossing at grade is now of far greater importance to the highway users than it is to the railroad crossed. For the rail operations are few; those of motor vehicles very numerous."

In referring to the situation presented in that case, particularly the factor of competition of carriers by rail and carriers by highway, the Court also said (294 U.S., at pp. 426, 427-428):

"The new highway, paralleling lines of the Railway and intended for rapid-moving motor vehicles, will, through competition for both freight and passenger traffic, seriously decrease rail traffic and deplete the Railway's revenue and net earnings. Practically all vehicles moving upon it will directly or indirectly compete for traffic with the Railway. Buses will operate over the new highway in regular scheduled movements in the same way as passenger trains. Trucks, some of them 70 feet in length and many weighing with load as much as 50,000 pounds, operated by common carriers, by contract carriers and by private concerns, will compete for the most profitable classes of freight. The competition besides reducing the volume of traffic will compel reduction of rates.

How disastrously such competition will affect the Railway's traffic and revenues is shown by its own experience since the State commenced, with the aid of the Federal Government, a system of highways paralleling the lines of the Railway."

* * * * * * *

"While the Railway, the sufferer from the construction of the new highway, is burdened with one-half the cost of the underpass, the owners of trucks and buses and others, who are beneficiaries of its construction, are immune from making any direct contribution toward the cost. It is true that one-half of the cost is by law to be borne by the highway fund of Tennessee (except in so far as it may be covered by the Federal aid), and that the truck and bus owners and others contribute as taxpayers to that fund. But, while nearly 28 per cent. of the gross revenues of the Railway is required annually to pay the state and local taxes and the cost of maintaining the roadway acquired and constructed at its own expense, the state commercial motor carriers,

> which are supplied by the State with the roadway on which they move, pay in state and local taxes not more than 7 per cent. of their gross revenues. The taxes laid upon truck and bus owners are clearly insufficient to pay their fair share even of the cost and maintenance of the highways which serve them."

It is of course true that the Court's comments above quoted do not apply with literal exactness to the Los Feliz separation. This is not a new highway paralleling the lines of petitioner, but is nevertheless an important improvement in a main artery which carries a substantial volume of directly competitive traffic. For it is still true here, as in the cited case, that petitioner is in competition with many of those who now use the Los Feliz crossing and will use the new underpass; and therefore petitioner, like the railroad appellant in the cited case, is in a very tangible way a sufferer from the proposed improvement rather than a substantial beneficiary thereof. The owners of the motor vehicles who will use the underpass are the primary beneficiaries; and to them should be added also those users of San Fernando Road (U.S. 99) who will be able to move along that roadway with less delay because the "back-lash" created by the Los Feliz grade crossing will be eliminated.

It is also true here that under the Commission's proposed apportionment of the costs, the owners of the highway vehicles who will be the beneficiary of the new underpass are immune from making any direct contribution toward the cost, except to the extent that some part of the motor-vehicle taxes paid by them as part of the purchase price of the fuel they consume may ultimately find its way into the funds to be contributed by the County of Los Angeles and

the Cities of Los Angeles and Glendale. Thus it is clear that petitioner, which under the order will be compelled to pay directly ½ ($746,600) of the entire allocable cost of ($1,493,200) of the improvement, will be thus contributing directly some $627,000, or approximately 42% of the cost, for the primary benefit of the owners of the motor vehicles, who in many instances will use the structure in order to compete more efficiently with the petitioner. As already shown, the figure last cited represents the amount by which the 50% contribution ($746,600) imposed on petitioner exceeds the calculated capital value of the benefits ($118,340) accruing to petitioner if the separation is built.

III.

THE ORDERS OF THE COMMISSION, IF CONSIDERED AS A PURPORTED EXERCISE OF THE POLICE POWER, ARE UNJUSTIFIED AND UNREASONABLE, IN THAT:

(a) No Material Considerations of Safety of Persons or Property Are Involved, or Shown to Exist, in the Situation to Which Said Orders Are Directed;

(b) Petitioner Has Not, by Any Act, Action or Omission of Its Own Created or Increased Any Hazard, Inconvenience, Obstruction, or Interference Affecting the General Public, or Those Portions Thereof Who Use the Los Feliz Crossing; Any Such Conditions, to the Extent That They May Exist, Having Arisen Out of Circumstances Wholly Beyond Petitioner's Control or Responsibility.

Note: The discussion in this subdivision covers also Specification of Error No. 7 set forth in the petition as follows: "7. The Commission's orders, in apportioning to petitioner 50% of the cost of the proposed construction, are invalid and beyond the authority of the Commission, and the ultimate findings of fact on which such action is based are not supported by, and are contrary to, the evidence."

The specifications of error above are addressed directly to the Commission's adoption of and reliance upon the

"barrier" theory or concept, in arriving at the contribution to be exacted from the petitioner. The Commission's views are stated in the following language of the opinion in its Decision No. 47420 previously quoted but here repeated for convenience:

> "While the railroad contended that the costs should be assessed according to the so-called 'benefits' theory, we affirm our holding in Decision No. 47344, dated June 24, 1952, on Application No. 29396, wherein it was held that the authority of this Commission to allocate costs stems primarily from Section 1202 of the Public Utilities Code and is an exercise of the police power on the part of the State of California through the medium of its agency, the Public Utilities Commission. Therefore, we are not bound to follow the so-called 'benefits' theory, although it is appropriate to observe that the proposed grade separation will obviously be of benefit to the railroad." (Appendix, p. 32.)

The exercise of the so-called police power to compel the railroad to contribute an amount far exceeding the benefits received, as in the case at bar, must rest upon findings, adequately supported by evidence, to the effect that either (1) public *safety* requires the proposed separation, or (2) the railroad has created or contributed to a situation where the *convenience* and *necessity* of the public are adversely affected.

It is quite true that, under the rule of many decisions (including those principally relied upon by the Commission in this and the companion decision (No. 47344) involving the Washington Boulevard underpass; e.g., the *Omaha*, *Erie*, and *Lehigh Valley cases*, *supra*), in a grade-separation case where safety is genuinely involved, and

need on that ground is shown for the separation, the railroads have been required to contribute far more than would be equitable if the allocations corresponded to the benefits. These results were no doubt traceable to the concept that the railroad was inherently a dangerous instrumentality, and should therefore be compelled *at its own cost* to *safeguard* the public, so far as possible. Compare the comments of the United States Supreme Court at page 429 of the opinion in the *Walters case*, particularly footnote No. 37.

However, the record here shows that in this case there is no basis for the assertion of the police power against the railroad, on the sole ground of public safety, and without regard to benefits. At the risk of repetition, we point out again that the record before the Commission not only fails to show the existence of any particular hazard at the Los Feliz crossing, but instead effectively demonstrates that in a practical sense, and with the existing protection, *there is no substantial hazard*. In fact, although about 27,000 highway vehicles *per day* (or more than a million a year) traverse the crossing, there have been but 14 accidents at the crossing in more than 25 years, and only 10 injuries to persons including 1 fatality. The mathematical risk of accident is thus so slight (about 1 to 1,750,000) as to be completely negligible. On these facts, it could not reasonably be contended that *public safety* requires the separation; and it is fair to say that the record indicates that no such claim has been seriously made. In its findings, the Commission does not include any separate mention of safety considerations. In fact, except for the inclusion of the word "safety" in a mere formal finding in the close of the opinion (Appendix, p. 32) that word does not appear at all in the

opinions, nor is any evidence relative thereto cited by the Commission, other than passing mention of the very small amount of "accident damages" ($475) paid as an annual average by the petitioner.

It being clear that safety considerations would not and do not justify the imposition here of the major burden of cost upon the railroad the only other justification, even under the Commission's view of the police power, would have to be that the railroad has caused or contributed to an impairment of and interference with the convenience and necessity of the public.

On this point the evidence, and to some extent at least the Commission's own opinion, show:

(1) The railroad was in its present location many years before the roadway now known as Los Feliz was built or opened, even as a country road;

(2) The Cities of Glendale and Los Angeles, which formerly did not include the Los Feliz crossing, have extended their boundaries and grown to their present populations and areas, over the years since the railroad was constructed, but largely since 1920 and even to a major extent since 1940;

(3) Los Feliz has attained its present importance as a main artery between these cities, and a major cross connection between other important routes, as a result of this growth and development of the cities and the surrounding county territory, and entirely independent of any action by the railroad;

(4) The volume of automotive traffic on Los Feliz has greatly increased in the past 20 years, but the volume of traffic on the railroad, measured by the number of trains

and train movements across the crossing, has increased very little if at all, and for some years past has been practically constant;

(5) The increase in the highway traffic volume on Los Feliz has been due to, and essentially an incident of, the development and constantly increasing use of all types of motor vehicles, including highway motor trucks as well as ordinary passenger-type automobiles, and especially the widespread use of motor vehicles in Los Angeles County and Southern California generally.

On these facts it is clear that the railroad itself bears little if any responsibility for the creation of the conditions which are asserted to cause delay, and thus "inconvenience", to highway traffic at the Los Feliz crossing. The railroad did not seek to have the crossing installed; at most, it merely consented (Exhibits 13 & 14). While the railroad did encourage and promote the growth of the cities and the county, and no doubt has received some benefit therefrom, it can hardly be held to have been *responsible* for such growth.

Thus the second premise for the exercise of the police power to make this purely arbitrary allocation disappears, like the first, when the facts are fairly examined.

It should be added that the Commission does not make any specific finding, in Decision No. 47420, to the effect that petitioner is or was responsible for creating the conditions at the Los Feliz crossing now proposed to be corrected by the separation. However, that theory of railroad responsibility is inherent in the "barrier concept", and the resultant view (here followed by the Commission) that the police power may be resorted to, at the railroad's expense, in

order to remove the alleged "barrier". The Commission's adoption of the "barrier concept" in the present case is made evident by its reference to its recent Decision No. 47344, in the *Washington Boulevard case,* in which it refused, for apparently the first time since 1933, to be guided by the benefit principle, and reverted to the philosophy of its prior decisions in which the barrier concept was given weight.

It should also be understood that in arguing, as we do in this subdivision of this memorandum, that the asserted bases (of public hazard, and railroad responsibility for public inconvenience) for the barrier concept do not exist in this case, we do not in the least concede that that concept is or might be valid in some other grade-separation case. On the contrary, as previously emphasized we consider that the barrier concept is not a logical or satisfactory basis upon which either to decide whether a separation is needed, or to allocate its cost when built, because it fails to consider controlling economic factors, and conflicts with basic legal principles enunciated in the *Walters case.*

The history of what has been transpiring in the transportation industry in relation to the increase of population and urbanization is important in understanding the matters presented in this point.

The Stanford Institute's study relative to "The Railway-Highway Grade Crossing Problem" (to which previous reference has been made) contains a lengthy review of the "Background and Underlying Principles" of the "Development of Demand for Grade Crossing Improvements and Eliminations". In that discussion the following comments are included, in a section entitled "The New Demand—1920 to the Present":

"The period since 1920 has been one of tremendous economic growth for the United States notwithstanding the depression of the 1930's. Increased highway mileage and automobile usage were significant factors in this economic growth. The level of national income, as a measure of the economic well-being of the nation, is approaching three times the 1929 level. Population has increased about 45 percent. An increasingly larger percentage of that population is to be found in non-farm areas. Farm population declined 10 percent during the period, whereas non-farm population increased over 16 percent. This added further to traffic congestion in cities and their environs. A new demand for grade crossing improvements and eliminations developed during this period, based upon the public's desire for greater convenience in highway travel.

"Business and industry, which in the last thirty years have come to rely so heavily upon the highway system and automotive transport of materials and employees, have also experienced significant growth. The total number of business establishments in the nation has increased by over one-third since 1921. The number of gainfully employed workers has increased more than 50 percent. The number of employees in manufacturing plants is now about twice the number for 1921. The total value of manufacturing production is three times that for 1921. The dollar value of business sales has also increased many fold. The nation's industrial growth has brought about increased highway travel. This has resulted in increased demand for grade crossing improvements and eliminations based upon the factor of public convenience.

"It is clear that during the last thirty years there have been marked increases in business activity and population in the United States. In addition, tremen-

dous developments have occurred in the use of automobiles for both business and pleasure purposes. This has brought about increased congestion in and about the urban areas. During the same period of time, railway mileage operated decreased slightly. Furthermore, there has been a decrease in the number of passengers carried each year by the railroads. This came about because of the increased use of private automobiles, airplanes, and buses, which collectively have increased their passenger traffic many fold since 1921. The number of revenue tons of freight originated by the railroads has increased since 1921, but this increase has been less than 25 percent. Motor trucks now carry virtually all intra-city freight shipments. During the last decade, the number of revenue tons of carload traffic originated by Class I railroads increased about 45 percent, while the number of revenue tons of truckload traffic of Class I motor vehicles increased over 300 percent. The number of locomotives in service decreased by about 35 percent during the past thirty years. The number of freight cars in service decreased around 25 percent. Adjusting the number of freight cars for increased capacity per car shows a small decrease in total freight-car capacity."

(NOTE: The above statistical information is based upon the more precise statistics found in the following accepted source publications:

Statistical Abstract of the United States (1951—Seventy-Second Edition); published by the U. S. Department of Commerce;

Statistics of Railways in the United States. Published by the Interstate Commerce Commission;

The Economic Almanac of 1951-2. Published by the National Industrial Conference Board, Inc.)

The demand for railroads, their services, and the size of their system for serving the public has not increased at a rate proportionate to the increase in demand for trucks, automobiles, buses and highway facilities, nor to the rate of growth of the economy.

Moreover, it is probably reasonable to infer that the railroads have become fairly well-settled in the location of their principal routes and tracks.

Two specific developments of the past decade that have had additional significance for the grade-crossing problem are worth noting. First, there has been a substantial trend toward the decentralization of industry. This decentralization has been characterized to a large extent by the establishment of production plants in relatively small communities. This decentralization has been impelled by a variety of economic reasons principal among which have been:

1. Potential transportation economies gained by better distribution of production facilities in relation to the location of raw materials sources and new expanding markets.
2. National defense considerations.
3. Solving an industrial labor problem by creating plant locations in close proximity to rural surroundings, thus permitting employees to escape from city residence with its relatively higher cost of living and greater congestion.

The industrial growth of rural, semi-rural, and suburban communities has had marked effects on the demands for highway facilities in these areas. The transportation demand has increased due to the flow of industrial materials in and out of such communities, movement of workers to and

from their work, increased levels of income of such communities permitting automobile ownership and use for business and pleasure driving, and growth of commercial and residential areas on contiguous lands to serve the growing industrial and commercial populations. These developments, particularly, have caused the opening of new railway-highway grade crossings and an ever-increasing use of already established crossings. They have magnified the importance of the grade-crossing problem, as but one phase of the entire highway transportation problem, i.e., the necessity for creating additional highway facilities to provide the capacity to carry the loads of traffic generated by the economy.

The second significant development of the past decade has been the growth of suburban areas on the borders of large cities. A large portion of such population is economically tied to the cities in terms of employment, cultural development, and social relationships. This trend has caused the growth of suburban residential developments, the increase in mileage of local access roads connecting with primary and secondary highways, and the establishment of suburban commercial and shopping areas. These developments have had a multiplied effect, each on the other, in increasing the demand for new highway capacity and grade-crossing facilities.

It is fairly clear that the principal causes for the opening of new grade crossings and the demand for improvement and elimination of existing crossings are to be found in the demands of highway users for increased highway capacity. The larger amount of the benefits from crossing improvements and eliminations have accrued to vehicle users and the general public. It is reasonable, therefore, that there has

been a tendency for the railway portion of such costs to decrease.

The conclusion to be drawn from the above is that in reviewing the Commission's exercise of the police power, this Court should consider the revolutionary changes incident to transportation, wrought in recent years by the widespread introduction of motor vehicles and the need of these motor vehicles for more highways, the change in character, construction, and use of highways, and the change in the occasion for elimination of grade crossings.

IV.

THE ALLOCATION TO PETITIONER OF 50% OF THE COST OF SAID CONSTRUCTION IS PURELY ARBITRARY, HAVING NO EVIDENTIARY BASIS WHATSOEVER, AND IS WHOLLY UNRELATED TO ANY CONSIDERATION OF BENEFIT TO PETITIONER.

The protection of the Fourteenth Amendment to the Federal Constitution against orders requiring railroads to eliminate grade crossings at unreasonable expense is real, and not to be lightly regarded.

Lehigh Valley R. Co. v. Public Utility Commissioners supra (278 U.S. 24, at p. 34).

In the instant case the authority of the Commission is derived from the California Constitution, Article XII, Sections 22-24, and from the Public Utilities Code, Sections 1202 and 1214. The Commission's authority is not absolute. The Commission cannot constitutionally assess any proportion of the costs of a grade separation to the railroad arbitrarily or unreasonably, or simply because in the exercise of its police power it is able to say that to some extent or to any

extent public safety requires the construction of larger underpasses. Exercise of the police power must be devoid of oppression, and must not amount to an improper or arbitrary infringement upon constitutional rights.

5 Cal. Jur., Sec. 106, p. 695.

In *Archer v. City of Los Angeles*, 19 Cal. 2d 19, at pages 23-24, it is said:

> "The state or its subdivisions may take or damage private property without compensation if such action is essential to safeguard public health, safety, or morals. (*Gray v. Reclamation Dist.*, 174 Cal. 622.) (Citing cases.) In certain circumstances, however, the taking or damaging of private property for such a purpose is not prompted by so great a necessity as to be justified without proper compensation to the owner. (*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (43 Sup. Ct. 158, 67 L. Ed. 322); *Chicago B. & Q. R.R. Co. v. Chicago*, 166 U.S. 226 (17 Sup. Ct. 581, 41 L. Ed. 979).)"

The police power is subject to constitutional limitations therefore: (1) it may not be exerted arbitrarily or unreasonably; (2) that when particular individuals are singled out to bear the cost of advancing public convenience, the imposition of costs must bear some reasonable relation to the evils to be eradicated, or the advantages to be secured.

Nashville, C. & St. L. R. Co. v. Walters, supra (294 U.S., at pp. 415, 429)

In the instant proceeding the "evil to be eradicted" is the counterpart of the "advantages to be secured"; i.e., the elimination of delay to vehicular traffic.

If the Commission's decision is based upon its police power, the order on its face is an arbitrary exercise of that power. It fixes the railroad's share of the cost in round figures, at exactly 50%. Nowhere in either the evidence or the Commission's opinion is there any indication that the Commission computed this percentage on any logical or reasonable basis; from all appearances the percentage was plucked out of the air as the Commission's idea of rough justice, based upon unknown standards, outside the record, rather than upon up-to-date methods of calculating the value of benefits flowing from the elimination of vehicular delays and crossing hazards. If the Commission's decision is to have a rational basis, the value of promoting public convenience (or safety) can not only be calculated with reasonable accuracy, but *must* be based upon evidence (*Southern Pacific Co. v. Railroad Commission*, 13 Cal. (2) 125). The Commission can and did so calculate in its decision in the *Goshen Junction case, supra*, wherein the sum apportioned to the railroad in a proceeding resulting in the closing of not one, but two, grade crossings was arrived at by capitalizing an amount measuring the annual benefits and privileges received by the railroad on a 6% basis. The result of this calculation was to charge $15,000.00 to the railroad and $340,000.00 to the public authorities (see Exhibit G, p. 95 of the Appendix).

The Petitioner respectfully urges the Court to consider that this monetary value can be figured on a reasonable mathematical basis, as the Commission did in the *Goshen case, supra*, and need not be arbitrarily guessed at, or assessed in round percentage figures (compare Exhibit 2, pages 28-32, and Exhibit 20). Moreover, the Public Utilities

Commission has sizeable funds (see *Budget Act of 1950, Statutes of California*, Chapter 2, p. 310, and *Budget Act of 1951, Statutes of California*, Chapter 1020, p. 2706, appropriating $2,710,602.00 and $2,687,791.00, respectively, for support of the functions of the Public Utilities Commission). The Commission has numerous engineers who can calculate and place in evidence the reasonable value of the benefits in grade-crossing separation cases; and they would have but little difficulty, so far as *safety* benefits are concerned, in a case such as this where the only substantial evidence shows that accidents at the crossing have been relatively few and the corresponding expense nominal. (See the *Annual Report of the Public Utilities Commission* for July 1, 1949, to June 30, 1950, page 97, which states that during the year 264 applications have required investigation and reports by the Engineering Section of the Transportation Department, and that among the matters covered are authorizations for the construction and protection of grade crossings and grade separations.)

It is obvious, therefore, that there is no necessity for an arbitrary determination of the amount, if any, which should be assessed against the railroad. On this particular phase of the problem petitioner submits that the imposition of 50% does not bear a *reasonable*, or any, relation to the "evils to be eradicated", or the "advantages to be secured" in the existing situation.

The Commission in its opinion (Appendix, p. 32) recognizes that its authority to apportion costs is found in Section 1202 of the Public Utilities Code. Certain language in that Section should be closely examined. Section 1202(c) provides:

> "The Commission has the exclusive power: (c) . . . to prescribe the terms upon which such separation shall be made and the proportions in which the expense . . . shall be divided . . . between such (railroad) corporations and the state, county, city, or other political subdivision affected."

Can the Commission arbitrarily apportion the expense? Can the Commission arbitrarily apportion the cost 50% on the railroad and 50% on the municipal corporations? What yardstick shall be used? It is elementary that the Commission cannot act arbitrarily.

After referring to the "benefit" principle in language already quoted at length, the Commission went on to conclude:

> "Therefore, in view of all the evidence in this case and considering the positions of the respective parties hereto, we hereby find that, of the allocable costs . . . Southern Pacific Company should bear 50 per cent . . . the County of Los Angeles 25 per cent . . . and the Cities of Glendale and Los Angeles 12½ per cent each . . ."

Obviously the Commission was using no yardstick. There was nothing to support such a finding, except the reference to the police power. How can the Commission reach such a percentage?

Brief reference has already been made to the comprehensive report of the Stanford Research Institute, published under date of May 1, 1952, entitled, *"The Railway-Highway Grade Crossing Problem."* The purpose behind this report is stated in its Preface, as follows:

> "The grade crossing problem is of major importance to the railroads, motor vehicle users, and the general

public. In many instances, all of these groups are required to participate in the cost of grade crossing improvements and separations. A question often arises as to the relative financial responsibility of each group for specific improvements.

"The Stanford Research Institute recognized in late 1950 that this problem required some organized research effort in order to permit development of a sound public policy by agencies concerned with grade crossing improvements and eliminations. Throughout 1951 and early 1952, the Institute engaged in a study of the problem with particular reference to the California situation. The results of this study are being made available in this report. It is being released as a part of the Institute's continuing program of public service research.

"This report deals with economic aspects of the grade crossing problem. It makes no attempt to cover the many political and sociological problems involved in highway projects generally and in grade crossing projects particularly. The overall objective of the report is to set forth sound economic principles applicable to the grade crossing problem. Often adequate data are not available upon which to base factual conclusions. In such cases, the report presents the economic reasoning supporting the conclusions as stated . . ."

". . . The Stanford Research Institute hopes that this report will be of some assistance to the transportation industry, government agencies, and the public in their consideration of the grade crossing problem." (Page iii)

In Part 2 of the report, at p. 44, under the heading "Approaches to Evaluating Grade Crossing Projects" the following conclusions are stated:

ALLOCATING COSTS FOR GRADE CROSSING PROJECTS

1. All grade crossing improvements and eliminations provide joint services or products for motor vehicle users, the railroads, and the general public.

2. The costs of grade crossing improvements and eliminations are joint costs.

3. When products or services are produced jointly, their costs are joint and cannot be allocated directly to each product. In such cases, joint costs can only be distributed in accordance with the relative demand for the products or services.

4. The relative demands of the several beneficiaries for the services of grade crossing improvements and eliminations should determine the distribution of the total (joint) costs of the projects among the beneficiary groups.

5. The relative demands of the beneficiary groups should be measured by the relative value of benefits each receives from the grade crossing projects.

6. There is no essential difference in sound principles of cost allocation between (a) grade crossing improvements, (b) separations, and (c) opening and closing of crossings.

7. Any distribution of costs based upon whether the highway or railway was first located at the crossing is not economically sound.

8. Almost all states have statutes either fixing the distribution of costs for crossing projects or vesting the power to do so in a public body.

9. Two significant tendencies have developed over recent years in distribution of the costs for grade crossing projects. First, the percentage of total costs assigned to railroads has declined. Second, state laws are providing increasingly for distribution of costs on the basis of benefits received.

10. The United States Supreme Court has formally recognized the validity of distributing costs for grade crossing projects among beneficiary groups on the basis of relative benefits received.

11. The policy of distributing costs for projects undertaken with Federal-aid funds by assigning arbitrary values of benefits to the railroads and to the general public is economically unsound.

12. Prior to 1933, the California Public Utilities Commission assigned costs for projects to the railroads and the public generally on a fifty-fifty basis. Subsequently, the Commission adopted the benefit basis for cost distribution on crossing projects.

13. In 1949, the California Public Utilities Commission gave evidence of reverting to its earlier unsound fixed-percentage basis of cost assignment on grade crossing projects. The particular case reflecting the change in Commission policy was presented for a rehearing, and no decision on the rehearing has yet been rendered by the Commission."*

The report then points out (at p. 47):

FIXED-PERCENTAGE BASIS NOT SOUND

"A policy of assigning costs for a grade crossing improvement to railroads (or to other beneficiary groups) on the basis of a fixed percentage of total costs is no more realistic or economically sound than is an assumption that the economic nature and character of the grade crossing area, crossing usage, and highway development and usage may be identical as between grade crossings. Economic variations relating

*This reference is to the *Washington Boulevard* case, in which the Commission's decision on rehearing was rendered June 24, 1952 (Dec. No. 47344). That decision is now before this Court on petition for review: S. F. No. 18671.

to various grade crossings are so great that a fixed-percentage basis of cost allocation cannot be economically sound."

The report then adds the following comments (pp. 48-49):

THE SUPREME COURT ON COST DISTRIBUTION

"Legal responsibility of the railroads for assuming costs on grade crossing projects was defined by the Supreme Court in a 1914 ruling based, of course, upon economic conditions in existence at the time.

"It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings, but also to build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their tracks, or to carry their tracks over such highways . . .[9]

"In another 1914 case, the same court said:

'That a railway company may be required by the state, or by a duly authorized municipality acting under its authority, to construct overhead crossings or viaducts at its own expense, and that the consequent cost to the company as a matter of law is . . . deemed to be compensated by the public benefit which the company is supposed to share, is well settled by prior adjudications of this court . . . (citing cases.)'[10]

"Under these decisions it may be inferred that there is no legal limit to the portion of the total costs for grade crossing improvements and eliminations which may be assigned by public bodies to the railroads.

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[9] *Chicago, M. St. P. R. Co. vs. Minneapolis*, supra.

[10] *Missouri Pacific R. Co. v. Omaha*, supra.

These cases were, however, predicated upon a different set of economic facts than exists today. The requirement for grade crossing improvements in 1914 was a requirement for increased public safety, and not basically a demand for increased free flow of traffic at crossings as is the case today.

"Freund has made the following observation:

'It is an elementary principle of equal justice that where the public welfare requires something to be given or done, the burden be imposed or distributed upon some rational basis, and that no individual be singled out to make a sacrifice for the community. The principle lies at the foundation of the law of taxation, and applies equally to the police power. With reference to the latter it may be expressed by saying that to justify the imposition of a burden there must be some connection of causation or responsibility between the person selected or the right impaired and the danger to the public welfare or the public burden which is sought to be avoided or relieved."[11]

"The Supreme Court, while recognizing the regulation of grade crossings as a legitimate exercise of the police power of the states, has indicated that this power is subject to a constitutional limit and that it may not be exerted arbitrarily or unreasonably. The court, in a 1935 case involving allocation of costs of a grade crossing elimination took into full account the change in economic conditions since its earlier decisions. It also recognized the necessity for justifying a burden on the railroads for such costs. The Court said:

'The railroad has ceased to be the prime instrument of danger and the main cause of accident. It is

[11]Ernst Freund, The Police Power, p. 635.

the railroad which now requires protection from dangers incident to motor transportation. Prior to the establishment of the Federal aid system . . . highways . . . served, in the main, local traffic. The long distance traffic was served almost wholly by the railroads and the water lines. Under those conditions the occasion for separation of grades was mainly the danger incident to rail operations; and the promotion of safety was then the main purpose of grade separation. Then it was reasonable to impose crossings; and the imposition was rarely a hardship. . . . The need for eliminating existing crossings and the need of new highways free from grade crossings arose usually from the growth of the community in which the grade separation was made; this growth was mainly the result of the transportation facilities offered through the railroad; the separation of grade crossings was a normal incident to the growth of rail operations; and as the highways were then feeders of rail traffic, the community's growth and every improvement of highway facilities benefited the railroad. The effect upon the railroad of constructing . . . (modern) highways . . . is entirely different. They are not feeders of rail traffic. They deplete the existing rail traffic and the revenues of the railroads. . . . The avoidance . . . (by grade separation) of traffic interruptions incident to crossing at grade are now of far greater importance to the highway users than it is to the railroad crossed, for the rail operations are few, those of motor vehicles very numerous."[13]

"This position by the Supreme Court indicates the legal as well as economic necessity for taking into account the reasons for grade crossing improvement and elimi-

[13] *Nashville, C. St. L. R. Co. vs. Walters*, supra.

nation projects, and for considering relative benefits, in distribution of costs for grade crossing projects."

The report also includes the following comments (at p. 16) under the topic:

"ACCIDENTS AS A BASIS FOR JUSTIFICATION OF GRADE CROSSING PROJECTS":

"1. Public safety remains the publicized basis of demand for railway-highway grade crossing improvements or eliminations, although the principal basis is actually the demand for greater conveniences in highway travel.

2. If only public safety were involved, adequate protection (except against careless drivers) could be obtained in most instances at less cost by installing highly effective protective devices than by constructing separations.

3. Grade crossing accidents in the United States have decreased slightly since 1934 even though there has been an increase in the number and use of motor vehicles on the highways. There has been a marked tendency toward relative improvement in the hazard situation.

4. Grade crossing accidents in the nation as a whole are not overly significant when compared with total highway accidents. Grade crossing accidents in California have in recent years declined in significance relative to total highway accidents.

5. Most highway accidents result basically from increased highway travel, inadequate highway capacity, and lack of caution by motor vehicle drivers.

6. The reduction of highway accidents involves three approaches: (a) additional safety provisions in vehicle construction, (b) regulation of highway uses

and education of users, and (c) design and construction of highways to provide additional built-in safety.

7. Motor vehicle users have a right to receive and public bodies a duty to provide adequate protection and warning devices at railway-highway grade crossings. If these warning and protective devices are provided but ignored, motor vehicle users should bear the economic responsibility for accidents."

When the Commission, in view of the record and its own acknowledgment (Opinion, p. 13, Appendix, p. 38) that a primary purpose of the proposed separation was to eliminate delay to vehicles, proceeded to apportion the cost at 50% to the railroad, the Commission acted arbitrarily, without authority of law, and violated the due process clause. We refer again to the pertinent language of the opinion in the *Walters case* (294 U.S., at pp. 428-429):

"The promotion of public convenience will not justify requiring of a railroad, any more than of others, the expenditure of money, unless it can be shown that a duty to provide the particular convenience rests upon it . . ."

and the Court's further statement that the railroad had no duty to provide separations, where the main purpose of grade separation was to further uninterrupted rapid movement by vehicle rather than the promotion of safety.

The Commission, in reverting to the 50 per cent formula, has simply shut its eyes to modern economic trends and the obvious directions of the Supreme Court of the United States. It has chosen to go backward rather than to progress.

The Commission therefore failed to pursue its authority, regularly or at all, so far as concerns the allocation of costs

between the parties and acted beyond the scope of its authority; and its order in the circumstances amounts to confiscation, in violation of the due process and other clauses of the Constitution of the United States and of the State of California.

In addition, the Commission in apportioning costs on a 50% basis acted so arbitrarily and unreasonably as to deprive Southern Pacific Company of its property without due process of law, in violation of the 14th Amendment to the Federal Constitution and Article I, Sections 13 and 14 of the California Constitution. (*Nashville, C. St. L. R. Co. vs. Walters*, supra; *Southern R. Co. vs. Virginia*, 290 U.S. 190, 78 L. Ed. 260)

Such action, because of its arbitrary character, also amounts to an undue burden on interstate commerce in violation of the commerce clause of the Federal Constitution, and violates the policy in favor of economical railroad operation, set forth as the National Transportation Policy (54 Stat. L. 899).

V.

THE COMMISSION IN ITS ORDERS AND DECISIONS HEREIN HAS FAILED TO FIND ULTIMATE FACTS ON MATERIAL ISSUES, HAS MADE FINDINGS NOT SUPPORTED BY ANY SUBSTANTIAL EVIDENCE, AND FURTHER HAS MADE FINDINGS CONTRARY TO THE EVIDENCE, AND THUS HAS DENIED TO PETITIONER ITS CONSTITUTIONAL RIGHTS TO DUE PROCESS.

(a) The Finding with Respect to Public Safety is Unsupported by the Evidence, and Such a Finding is Therefore a Denial of Procedural Due Process.

The only finding of the Commission in which "safety" is mentioned is contained in a one-sentence paragraph (on p. 13, lines 13-22). The material portion of that finding reads:

"We hereby find it to be *in the interest of public safety*, convenience and necessity and that it would be practicable *to require the construction of a grade separation.*" (Emphasis added) (Opinion, p. 13, Appendix p. 32)

The trains crossing Los Feliz operate at slow speeds (Rep. Tr. p. 67). The passenger trains stop at Glendale station located a short distance south of Los Feliz (Ex. 19 and Rep. Tr. p. 67). The outbound freight trains are ascending a grade and operate at slow speed (Rep. Tr. p. 67); while the inbound trains are also going slowly (Rep. Tr. p. 67), preparatory to entering the yard (Rep. Tr. p. 67). Los Feliz is protected by 24-hour manually operated gates (Exs. 2, 19 and 20), so designed and operated as to afford virtually complete safety (Rep. Tr. pp. 248-50).

Evidence relating to public safety is also found in Exhibit 2 (See Appendix pp. 86-91), which was an Engineering Study participated in by all interested parties under the supervision of the Commission's Chief Engineer. In Part V thereof, entitled "Economic Justification For The Separation," (pp. 28-32; Appendix pp. 86-91) there appears the following:

"The Los Feliz Boulevard grade crossing is now protected by manually operated crossing gates over the entire 24 hour period. The accident record during the period January 1, 1926 to March 31, 1951, is shown on accompanying table, there being a total of 14 collisions between trains and automobiles at this crossing in the last 25 years resulting in one death and nine injuries." (p. 28 of Exhibit 2; p. 87 of Appendix).

The total accident damage paid by the railroad averaged $475 a year (Ex. 20). This phenomenal safety record, where

27,000 vehicles are presently using the crossing each day, clearly points out that public safety considerations cannot possibly be relied upon as justifying the separation. The fact that the evidence does not justify a finding that public-safety requirements support the proposal was also discussed in Subsection I of this Memorandum (pp. 42-44).

The sole justification for the proposal urged before the Commission was that the separation would eliminate vehicular delay. A portion of the evidence of the Planning Director of Glendale summarized the reasons for the separation as follows:

> "that the substantial *delay, inconvenience* and *losses of time and money* be eliminated." (Rep. Tr. p. 21, lines 20-22). (Emphasis added).

The controlling motivation for a grade separation was well set forth in a question directed to and answered by the principal Traffic Engineer of the City of Los Angeles, as follows:

> "Q. In other words, the benefits to Glendale of a grade separation would be the elimination of the blocking at San Fernando Road; that is the principal additional benefits you think Glendale gets from the grade separation? A. Yes, and I think the State gets it because of the increased volume of traffic that they are able to move on San Fernando Road." (Rep. Tr. p. 191, lines 14-19).

The significance of the factor of vehicular delay was, as already shown, especially recognized in the *Walters case* (294 U.S., at p. 421-2, 79 L. ed., at p. 959) where the Court said:

"The main purpose of grade separation therefore is now the furtherance of uninterrupted, rapid movement by motor vehicles." (Emphasis added).

The Court also commented (at pp. 415-416):

"Unless the evidence and the special facts relied upon were of such a nature that they could not conceivably establish that the action of the state in imposing upon the Railway one-half of the cost of the underpass was arbitrary and unreasonable, *the Supreme Court obviously erred in refusing to consider them.*" (Emphasis added).

and (p. 428):

"The Supreme Court of Tennessee erred in refusing to consider whether the facts relied upon by the Railway established as arbitrary and unreasonable the imposition upon it of one-half the cost of the underpass."

The finding of "public safety" is not supported by the record. The most that the evidence shows is that the separation will eliminate delays to vehicles at the Los Feliz crossing and along that route (Ex. 2, Appendix pp. 86-91). Evidence relative to vehicular *delay* furnishes no support to a finding relative to public *safety*.

Section 1760 of the Public Utilities Code provides that where it is claimed that an order of the Commission violates rights under the Federal Constitution,

"the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final."

This statutory provision, requiring this Court to exercise an independent judgment of the law and the facts where rights under the Constitution of the United States are asserted but have been denied, is in conformity with the controlling rule declared in numerous decisions of the United States Supreme Court:

Bluefield Co. v. Pub. Serv. Comm. (1923), 262 U.S. 679, 67 L. ed. 1176;

Ohio Valley Co. v. Ben Avon Borough (1920), 253 U.S. 287, 64 L. ed 908;

Ogama v. California (1948), 332 U.S. 633, 636; 92 L. ed. 249;

Niemotko v. Maryland (1951), 340 U.S. 268, 271; 95 L. ed. 267;

American Toll Bridge Co. v. Railroad Com. (1938), 12 C.2d 184, 191-4; aff. 307 U.S. 486; 83 L. ed. 1414;

Alabama Public Service Commission v. Southern Railway (1951), 341 U.S. 341, 348, 95 L. ed. 1002, 1006 (A similar state statute and state court holding that the state court would independently review both laws and facts in an appeal from the Commission were approved, and the Court then held that a utility could not relitigate the factual question in a separate suit (to enjoin the Commission) in the District Court);

Southern Calif. Edison Co. v. Railroad Com. (1936), 6 C.2d 737, 744; 59 P.(2d) 808;

Laisne v. Cal. St. Bd. of Optometry (1942), 19 C.2d 831, 848; 123 P.(2d) 457.

Further, as far as the law of the State of California is concerned, there "must be *sufficient competent* evidence" to support the findings of the Commission:

27 Cal. Jur, 575;

2 Cal. Jur. (2) 382 (Note 14);

Southern Pac. Co. v. Railroad Com. (1939), 13 C.2d 125, 127-8, 87 Pac.(2) 1052.

Such evidence is lacking in the record as far as safety is concerned, both as to competency or sufficiency. The bare finding of "public safety . . ." cannot be supported by the record, either upon examination to see if the evidence in the record sustains such a finding, or upon this Court's exercise of an independent judgment of the facts (Public Utilities Code, Sec. 1760; *Nashville C. & St. L. Ry. v. Walters, supra*).

Since the Commission's finding of "public safety" is not supported by substantial evidence, the finding of the Commission on this topic is null and void, and petitioner was not accorded a fair hearing in that the guarantee of procedural due process was violated (*Southern Pac Co. v. Railroad Comm. (supra)*, 13 Cal.(2) 125.

(b) The Absence of Findings on Material Issues Requires That the Decisions Be Set Aside.

The method adopted in the Commission's Opinion and Decision No. 47420 (Appendix, pp. 19-36), of reciting and summarizing evidence of a particular witness, without stating any conclusion on that evidence, makes it exceedingly difficult, if not impossible, to ascertain just what the Commission was attempting to find in the way of facts to support its decision.

In this respect the Opinion and Decision in the present matter resemble those so aptly described by this Court in *Southern Pac. Co. v. Railroad Comm.* (1939), 13 C.2d 125, 127, 87 P.(2d) 1052, as follows:

"... its ruling, which includes a commingling of argument, findings of fact and conclusions of law, ..."

The Commission in the present case not only used a similar form for its ruling, but also interspersed summaries of the evidence of some of the witnesses and exhibits into its present Opinion.

There is little statutory direction upon the subject of findings. Section 1705 of the Public Utilities Code provides:

"After the conclusion of the hearing, the Commission shall make and file its order, containing its decision."

Section 1757 of the Public Utilities Code provides in part:

"The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review except as provided in this article. *Such questions of fact shall include ultimate facts* and the findings and conclusions of the commission on reasonableness and discrimination." (Emphasis added.)

Thus it appears that the code contemplates that the Commission shall decide upon not only ultimate facts, but also questions of fact. (See also *Southern Pac. Co. v. Railroad Comm.* (1939), 13 C.2d 125, 129, and cases cited therein.)

The question of just what findings must be made by the Commission has not been fully explored by the Courts; although the above language of Section 1757 of the Public Utilities Code seems clear in requiring that the "questions of fact shall *include* ultimate facts". The use of the word

"include" presupposes findings of fact; otherwise, the word "include" would be meaningless.

In each type of case coming before it, the Commission has the duty of making findings of the character required by statute. (*So. Calif. etc. Lines v. Public Utilities Comm.* (1950), 35 C.2d 586, 592, 220 P.(2d) 393; *In Re Pacific Gas and Electric Co.* (1941), 43 C.R.C. 753, 757). Under Section 1063 of the Public Utilities Code (former Section 50¾ of the Public Utilities Act of 1915) it was held that specific *negative* findings need not be made (*So. Calif. etc. Lines v. Public Utilities Comm.* (1950), 35 C.2d 586, 593, 220 P.(2d) 393). The Commission must find upon the ultimate facts (*Oro Electric Corp. v. R. R. Comm.* (1915), 169 Cal. 466, 471, 147 Pac. 118).

In *Southern Pac. Co. v. R. R. Comm.* (1939), 13 C.2d 89, 108, 87 P.(2d) 1055, the Court in a rate case held that a finding of reasonableness met the requirement of the statute where:

> "As repeatedly hereinbefore has been indicated, the commission made the finding 'that the reduced railroad rate . . . is *unreasonably low and not justified by transportation conditions.*' (Emphasis added.) And with respect thereto, specifically it is urged by the petitioner that, standing alone, without the presence of specific or essential findings upon which it must be made to rest, such 'finding' is insufficient. It is important to note that by the quoted language of section 67, the commission is authorized to include *'ultimate'* facts in its findings and conclusions on *reasonableness* and discrimination."

(p. 113):

> "In reliance upon the reasoning and the authorities that thus are cited in the Oregon case, together with a

consideration of the language used by the legislature of this state in its enactment of section 67, it is concluded that the finding here under discussion is not properly subject to the objections made by the petitioner, *provided, of course, that it has sufficient support in the evidence.*" (Emphasis added.)

In

Southern Pac. Co. v. Railroad Comm. (1939), 13 C. 2d, 125, 87 P.(2d) 1052 (cited *supra*),

this Court held that the Commission cannot disregard evidence and decide issues according to the Commission's own concept, saying (at p. 130):

"Although in the instant matter, in effect, the commission contends that regardless of the strength of evidence presented by the petitioner, and even in the absence of any evidence introduced to the contrary, the commission has the right to disregard the evidence and decide the issue according to its own concepts,—as a conclusion from the foregoing authorities it becomes apparent that the Railroad Commission has no greater authority than has the Industrial Accident Commission on questions of fact; and where, as here, all the evidence supports the petitioner's contention, and none has been adduced in opposition thereto, the ruling of the commission amounts to the making of an order by the commission without any evidence in support thereof."

The necessity for findings by an administrative agency may rest upon constitutional grounds (*Wichita R. & L. Co. v. Public Utilities Comm.*, 260 U.S. 48, 67 L. ed. 124; *Mahler v. Elby*, 264 U.S. 32, 68 L. ed. 549), or, as here, upon a statutory requirement. The basic purposes of findings are to aid the Court in determining whether there

is sufficient evidence as to support them (*Atchison, T. & S. F. Ry. Co. v. Commerce Comm.*, 335 Ill. 624, 167 N.E. 831); to enable the Court to examine the decision of the administrative agency in order to determine whether it is based upon a proper principle (*United States v. Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 79 L. ed. 1023); and to apprise the litigants or parties in regard to the reason for the administrative action as an aid to them in deciding whether additional proceedings should be initiated and, if so, upon what grounds (*Beaumont, S. L. & W. Ry. Co. v. United States*, 282 U.S. 74, 86, 75 L. ed. 221). Although administrative findings must conform to the statutes governing the particular agency, they need not be stated with the formality required in judicial proceedings (*Meeker & Co. v. Lehigh Valley R. Co.*, 236 U.S. 412, 59 L. ed. 644); (*Cantrell v. Board of Supervisors*, 87 Cal. App.2d 471, 197 P.2d 218).

As already emphasized, the Opinion of the Commission recites and summarizes the evidence of various witnesses, but does not embody any findings as to that evidence. It cannot be determined whether the evidence of these witnesses was approved or rejected by the Commission. This summary of the evidence is interesting reading, but it cannot be ascertained from either the Opinion, the Decision or the Order whether the Commission found the recited facts to be true or false.

It is submitted that the parties are entitled to know from the decision and order the facts found by the Commission, as well as ultimate facts (*N. C. & St. L. Ry. Co. v. Walters supra*). This method of summarizing the evidence, without making any finding as to the evidence recited, leaves the record of the proceeding barren so far as concerns find-

ings of fact other than perhaps *ultimate* facts. The statute provides the method and procedure for the reivew of decisions and orders of the Commission. The Commission should make a faithful effort to follow the statutes and cases upon the subject (*Southern Pac. Co. v. Railroad Comm., supra*, 13 C.2d 125, 87 P.(2d) 1052), in order that the Courts may be able properly to review the Commission's decisions. For the Commission to refuse or omit to do so is arbitrary, unreasonable and oppressive, and amounts to a failure regularly to pursue its authority.

Neither the decision nor opinion finds as a matter of fact or ultimate fact that Los Feliz is a road of considerable importance (Rep. Tr. p. 20) leading principally to many population centers in Southern California; that Los Feliz is a major traffic artery, and a route over which traffic of major importance to the metropolitan area will flow in increasing volume (Rep. Tr. p. 23); that traffic from Antelope Valley to the Los Angeles Harbor (Rep. Tr. p. 26), and from the desert, beach and mountain areas (Rep. Tr. p. 29) uses Los Feliz in large volume; that travel to and from the interior (Sacramento and San Joaquin Valleys) uses Los Feliz (Rep. Tr. p. 30); that Los Feliz is a very important segment of the Master Highway Plan (Rep. Tr. p. 27); that Los Feliz is an important road (Ex. 2 and Rep. Tr. p. 185 and p. 195); although much evidence was introduced upon these matters. Further, neither the Decision nor Opinion includes a finding, in accordance with the evidence, that state gas tax funds will be used or are available to finance the project (Rep. Tr. p. 301-2).

Neither the Opinion nor Decisions find that the railroad has ceased to be and is no longer the prime instrument of danger, or the main cause of accident.

In addition, the Commission in its Decision and Opinion failed to find that the roadways involved are not feeders of rail traffic, and that the avoidance (by grade separation) of traffic interruptions incident to the Los Felix crossing (at grade) is now of paramount importance to the highway users, but of no importance at all to the railroad.

The above omissions of findings of fact and ultimate fact compel the conclusion that the Commission has acted arbitrarily, and that petitioner has been denied a fair hearing, all in violation of the substantive or procedural due process of law required by the 14th Amendment to the United States Constitution and by Article 1, Section 13, of the California Constitution (*Southern Pac. Co. v. Railroad Comm., supra* (13 C.2d 125, 128-8, 87 P.(2d) 1052)). In fact, it is obvious the Commission has "disregarded the evidence and decided the issue according to its own concepts". This the Commission cannot do. The Commission must act upon *evidence*, and not arbitrarily (*American Toll Bridge Co. v. Railroad Comm.*, 12 C.2d 194, 83 P.(2d) 1).

CONCLUSION

As stated at the outset of this memorandum, the issue here is not whether the Los Felix grade separation should be built, but solely whether petitioner should pay a share of the cost far exceeding any possible, or even arguable, benefits it might receive.

The evidence shows that greater freedom of movement of highway traffic--that is, elimination of vehicular delay upon a major traffic artery—will result from the separation, and is the real and only purpose thereof. Petitioner cannot benefit in any way from this result; indeed, to the

extent that competitive traffic (including that moving in private automobiles) using Los Feliz or other affected roadways is enabled by this improved facility to move faster or more cheaply, petitioner is damaged instead of benefited.

Petitioner's primary obligation at the crossing is to do its part in promoting the *safe* passage of highway traffic. The evidence, notably the actual experience at the crossing for the past 25 years, shows that this has already been fully accomplished. The proposed separation is plainly not required in the interest of safety; and consequently safety considerations cannot be urged as a basis upon which to compel petitioner to contribute to its cost.

Petitioner will benefit from the separation only to the extent that it will be relieved of the expense of maintaining and operating the safety devices now in use at the crossing damage payments for the accidents infrequently occurring at the crossing. These benefits are offset in part by the added expense of maintaining the bridge structure at the underpass. The capitalized equivalent of the net benefit is $118,340; and this amount is the maximum which, under any view of the case, petitioner may be required to contribute.

In the light of the facts and the law, as developed in this memorandum, the Commission's order imposing upon petitioner the payment of the sum of $746,600, more than six times the maximum possible benefit, is clearly unfair, unreasonable, arbitrary and burdensome.

It is elementary that petitioner, like any other citizen, may not be compelled against its will to contribute when it has no obligation, or to further the well-being of others (many of them actual or potential competitors) when the net result will be to its own detriment. It is equally well

established that the Commission, even though purporting to exercise the police power, may not act arbitrarily, or without adequate evidence to support its conclusions, or in such fashion as to deny due process of law or impose burdens upon interstate commerce.

The record shows that the decisions here under attack violate these basic principles. This Court should, therefore, issue its writ to review those decisions, and upon such review should order them annulled and set aside.

Respectfully submitted,

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Burton Mason,
Randolph Karr,
Attorneys for Petitioner

September 12, 1952
San Francisco, Calif.

(Appendix follows)

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APPENDIX

Exhibit A

Before the Public Utilities Commission

In the Matter of the Application of the City of Glendale, a municipal corporation, for an order or orders authorizing and requiring the construction of a grade separation of the crossing of Los Feliz Road and the railroad of the Southern Pacific Company, designating the portions of the work to be done respectively by said City, The City of Los Angeles and said railroad corporation, and allocating the cost thereof among said Cities and said railroad corporation.	Application No. 32385

To the Honorable Public Utilities Commission of the State of California:

The petition of the City of Glendale respectfully shows:

I

The applicant is a municipal corporation of the State of California organized and existing under a freeholder's charter adopted and approved pursuant to the provisions of the Constitution of said State, and is hereinafter called "Glendale."

II

The City of Los Angeles is a municipal corporation of the State of California organized and existing under a freeholder's charter adopted and approved pursuant to the provisions of the Constitution of said State, and is hereinafter called "Los Angeles."

III

The Southern Pacific Company, hereinafter called "Southern Pacific," is a railroad corporation as defined in the Public Utilities Act, which during all times hereinafter stated did and now does own, control, operate and manage a railroad as defined in said Act, consisting of two standard gauge main tracks, a standard gauge passing track and two standard gauge yard tracks [1*] five tracks in all) along the boundary line of Glendale and Los Angeles, particularly across Los Feliz Road-Boulevard, one of the public streets of Glendale, at the place hereinafter described. (Los Feliz is designated a Road in Glendale and a Boulevard in Los Angeles, and is hereinafter called "Los Feliz.")

IV

The crossing of said railroad and Los Feliz is designated in the files of your Commission as Crossing No. B-476.5, and the legal description thereof within Glendale County of Los Angeles, State of California, is as follows:

> That portion of the right-of-way (100 feet wide) of the Southern Pacific described in deeds recorded in Book 14094, Page 214, and in Book 17837, Page 49, Official Records in the office of the Recorder of Los Angeles County, California.

The legal description of that portion of the grade crossing within Los Angeles, County of Los Angeles, State of California, is as follows:

> A strip of land having a uniform width of 30 feet, its northeasterly line being coincident and identical with

*Numbers appearing in brackets [ ] indicate page numbers of original documents.

the southwesterly line of the Southern Pacific main line right-of-way (100 feet wide), said strip of land extending from the southeasterly line of Los Feliz (100 feet wide) to the northwesterly line of said Los Feliz.

V

Los Feliz is the most important highway artery between the western portion of Los Angeles, including the Venice and Hollywood districts, and Glendale, Pasadena, and the unincorporated communities in Las Crescenta Valley. This street crosses the railroad of Southern Pacific at the boundary line of Los Angeles and Glendale. Southern Pacific's Glendale station is located about 1200 feet southerly from the Los Feliz crossing. Los Angeles has constructed a bridge at the point where Los Feliz [2] crosses the Los Angeles River, located about one-half mile to the west of the railroad with a 70-foot roadway and two five-foot sidewalks. Los Feliz between Riverside Drive in Los Angeles and the Southern Pacific tracks is improved with a 70-foot roadway. Easterly of the Los Feliz crossing Los Feliz is improved with a 76-foot roadway and two seven-foot sidewalks. Approximately 850 feet easterly of the Los Feliz grade crossing Los Feliz crosses San Fernando Road, a State highway which parallels the railroad in Glendale and Burbank.

VI

Los Feliz is a heavily traveled street with approximately 26,000 vehicles passing over the Los Feliz grade crossing in a 24-hour period. The crossing has been the scene of many accidents, several of which have resulted in death and serious injuries to motorists and pedestrians. The view at the grade crossing is seriously impaired by buildings and

also at times by cars standing on the sidings. The crossing is now protected by crossing gates throughout the entire 24-hour period of each day. The gateman often experiences difficulty in operating the gates when traffic is heavy. It is not unusual for traffic to line up for a distance of a quarter of a mile or more waiting for the passage of a train. On occasions the traffic backs up and blocks the flow of traffic on San Fernando Road, a State highway.

VII

The need for a grade separation at the Los Feliz grade crossing was recognized by your Commission in Decision No. 17330, rendered on September 10, 1926, when the Commission found that there was urgent public necessity for grade crossing relief and ordered that the crossing be abolished by the construction of a suitable subway. On May 28, 1934, due to inability of the parties to finance the cost of a subway, the Commission ordered the case dismissed. Since 1926 the number of motor vehicles passing over [3] the Los Feliz crossing has almost doubled, and during that period the number of trains operated by the Southern Pacific has increased materially.

VIII

For the reasons above stated, the public need, safety, welfare and convenience require that a grade separation be constructed for the following purposes:

(a) To permit Los Feliz to carry its normal traffic without the delays caused by the passage of trains;

(b) To prevent traffic congestion and the blocking of traffic on San Fernando Road, a State highway; and

(e) To permit the public to receive and enjoy the full benefit of its present large investment in the traffic facilities afforded by the present improvements on Los Feliz.

IX

In order to meet such present needs, it is necessary that an underpass be constructed at the present grade crossing with a total street width of at least 70 feet (preferably two 40-foot roadways separated by a median strip, as recommended in the report of the Public Utilities Commission to the Assembly of the State of California dated March 6, 1950, furnished in response to House Resolution No. 24 adopted December 19, 1949) and a five-foot pedestrian walk on each side.

X

On the 2nd day of February, 1950, The Council of the City of Glendale adopted a resolution, a copy of which is marked EXHIBIT A and is hereto attached and made a part hereof. On the 15th day of June, 1950, The Council of the City of Glendale adopted Resolution No. 9264, a copy of which is market EXHIBIT B and is hereto attached and made a part hereof. On the 23rd day of February, 1951, The Council of the City of Glendale adopted the attached motion, a copy of which is marked EXHIBIT C and is [4] hereto attached and made a part hereof.

XI

Attached hereto and made a part hereof are the following exhibits:

EXHIBIT D. Map showing the location of all streets, roads, property lines, tracks, buildings, structures, and

other obstructions to view in the immediate vicinity of the Los Feliz grade crossing, and the width of the surface or pavement of Los Feliz adjacent thereto.

EXHIBIT E. Map showing the relation of the Los Feliz grade crossing to the existing arterial streets and the railroad in the general vicinity thereof.

XII

No exhibit showing the ground line and grade line and rate of grades of approach on all highways and railroads affected by the proposed grade separation has been attached as required by Rules 30 and 31 of the Commission's Rules of Practice and Procedure, for the reason that detailed plans of the proposed grade separation have not been prepared. It is expected that the Commission will fix the responsibility for the preparation of such plans, and that the plans when prepared will comply with Commission requirements as to width and clearances.

XIII

Relief is sought by applicant under Section 43 of the Public Utilities Act (Stats. 1915, p. 115, as amended).

XIV

The principal place of business of applicant is 613 East Broadway, Glendale 5, California.

XV

Communications in respect to this application are [5] to be addressed to Henry McClernan, City Attorney, 111 North Howard Street, Glendale 6, California.

WHEREFORE, applicant respectfully prays for an order or orders of your Honorable Commission, as follows:

(a) Authorizing and requiring the construction of said grade separation;

(b) Designating the portions of the work of said construction to be done by Glendale, Los Angeles, and the Southern Pacific respectively;

(c) Fixing, determining and allocating the portions of the costs of said work which are to be borne respectively by Glendale, Los Angeles, and the Southern Pacific, and fixing the time and manner of payment thereof; and

(d) Authorizing, requiring or directing such other or further matters and things in connection with said work as may be appropriate.

CITY OF GLENDALE,
a municipal corporation,
Applicant

HENRY McCLERNAN,
City Attorney

JOHN H. LAUTEN,
Assistant City Attorney

JOSEPH R. ROARK,
Deputy City Attorney

By JOHN H. LAUTEN,
Assistant City Attorney

Attorneys for Applicant [6]

the State of California, or other political subdivisions affected and

IT IS HEREBY FURTHER ORDERED that a hearing for the purpose of considering said matters be held before Commissioner Huls, and Examiner Syphers on the third day of October, 1951, at 10 a.m., in the Courtroom of the Public Utilities Commission, [1] Mirror Building, 145 South Spring Street, Los Angeles, California; and

IT IS HEREBY FURTHER ORDERED that the Secretary of this Commission serve, or cause to be served, a certified copy of this order upon each of the parties named herein at least five days prior to the date of hearing, it being found by the Commission that public necessity requires such shortened notice of time and place of hearing, and shall serve a copy of said order on all other parties interested in said investigation.

Dated at San Francisco, California, this 25th day of September, 1951.

R. E. MITTELSTAEDT
President

JUSTUS F. CRAEMER
HAROLD P. HULS
PETER E. MITCHELL
Commissioners

(Seal)
Certified as a True Copy

NOEL COLEMAN
Asst. Secretary,
Public Utilities Commission
State of California [2]

Exhibit C

Decision No. 47420

Before the Public Utilities Commission of the State of California

In the Matter of the Application of the CITY OF GLENDALE, a municipal corporation, for an order or orders authorizing and requiring the construction of a grade separation of the crossing of Los Feliz Road and the railroad of the SOUTHERN PACIFIC COMPANY, designating the portions of the work to be done respectively by said City, THE CITY OF LOS ANGELES and said railroad corporation, and allocating the cost thereof among said Cities and said railroad corporation.	Application No. 32385
In the Matter of the Investigation on the Commission's own motion as to the necessity of effecting a grade separation between the tracks of the Southern Pacific Company and Los Feliz Boulevard in the cities of Los Angeles and Glendale, County of Los Angeles, State of California, and the division among the affected parties of the cost incident to such separation.	Case No. 5327

John H. Lauten, Assistant City Attorney, for the City of Glendale, petitioner. *Randolph H. Karr*, for Southern Pacific Company, respondent. *Roger Arnebergh*, Assistant Attorney, for the City of Los Angeles

State of California
County of Los Angeles—ss.

CHARLES B. BAILEY, being first duly sworn, says:

That he is an officer of the City of Glendale, a municipal corporation of the State of California, applicant herein, to wit: City Manager of said City;

That he makes this verification for and on behalf of said City for the reason that it is a municipal corporation as aforesaid;

That he has read the foregoing application and knows the contents thereof and that the same is true of his own knowledge, except as to those matters stated on information and belief and as to those matters he believes it to be true.

CHARLES B. BAILEY

Subscribed and sworn to before me
this 1st day of May, 1951.

ARJUNA D. STRAYER
Notary Public in and for the County
of Los Angeles, State of California

(Seal)

EXHIBIT A

RESOLUTION OF INTENTION WITH RESPECT TO UNDERPASSES

WHEREAS, House Resolution #24, adopted by the California Assembly on December 19, 1949, did request that the appropriate officials of the City of Glendale, City of Los Angeles, County of Los Angeles, Southern Pacific Company, and the Public Utilities Commission initiate proceedings for separation of grades at Los Feliz Boulevard and Brand Boulevard, in Glendale and Los Angeles, in Los Angeles County, at the track crossings of the Southern Pacific Company; and

WHEREAS, pursuant to this request of the Legislature, the Public Utilities Commission did call a meeting of the interested parties on Thursday, January 19, 1950, at the Commission's office in Los Angeles; and

WHEREAS, at this meeting it was determined that the expeditious handling of the request of the Legislature could be best accomplished by the appointment of sub-committees, each of which would analyze the projects from the various standpoints, and the Glendale representative has been appointed Chairman of the Finance Committee; and

WHEREAS, the method of financing of the proposed underpasses is considered the most difficult phase of the entire problem, as is evidenced by the Public Utilities Commission's action in 1934 of abandoning these projects at the request of the interested jurisdictions because of their inability to finance their proportionate share of the cost; and

WHEREAS, the Council of the City of Glendale desires at this time to express its intention of assuming its propor-

tionate responsibilities in financing the projects; now, therefore,

BE IT RESOLVED BY THE COUNCIL OF THE CITY OF GLENDALE that the Council will proceed in good faith to assume its reasonable proportionate share of the cost of one of the underpasses, and if possible both of the underpasses, by either submitting the proposition to the voters for a bond issue at the first available election following formal order of the Public Utilities Commission, or other appropriate means of financing as it deems fit when the need arises.

I, G. E. CHAPMAN, City Clerk of the City of Glendale, do hereby certify that the foregoing resolution was duly adopted by The Council of the City of Glendale, California, at a regular meeting thereof held on the 2nd day of Febry, 1950, and was adopted by the following vote, to-wit:

Ayes: Baird, Burkhard, Campbell, Wickham, Wright
Noes: None
Absent: None

(s) G. E. CHAPMAN
City Clerk of the City of Glendale

(Seal)

EXHIBIT B

RESOLUTION NO. 9264

A RESOLUTION OF THE COUNCIL OF THE CITY OF GLENDALE REQUESTING THE PUBLIC UTILITIES COMMISSION OF CALIFORNIA TO INITIATE PROCEEDINGS ON ITS OWN MOTION FOR THE CONSTRUCTION OF A GRADE SEPARATION AT THE INTERSECTION OF LOS FELIZ BOULEVARD AND THE SOUTHERN PACIFIC RAILROAD TRACKS

WHEREAS, the Public Utilities Commission of California, in Cases Nos. 2124 and 2171 decided in 1926, recognized that the public convenience and safety required the elimination of the grade crossing at the intersection of Los Feliz Boulevard and the Southern Pacific Railroad tracks in the City of Glendale; and

WHEREAS, the need for a grade separation has continued to this date and is increasing; and

WHEREAS, the Assembly of the State of California has heretofore requested the Commission to institute proceedings for the elimination of such grade crossing, Now, Therefore,

BE IT RESOLVED BY THE COUNCIL OF THE CITY OF GLENDALE:

SECTION 1. The Public Utilities Commission of the State of California is hereby requested to initiate proceedings on its own motion for the separation of grades at the intersection of Los Feliz Boulevard and the Southern Pacific Railroad tracks.

SECTION 2. The Council reaffirms its declaration of February 2, 1950 that it will proceed in good faith to provide for Glendale's reasonable proportionate share of the cost of such a grade separation if it is ordered constructed by the Commission as a result of such proceedings, by either submitting a proposition to the voters for a bond issue at the first available election following formal order of the Commission, or by other appropriate means of financing selected by The Council when the need for funds arises.

SECTION 3. The City Clerk is directed to certify to the adoption of this resolution and to transmit a certified copy to the Public Utilities Commission of the State of California.

Adopted this 15 day of June, 1950.

(s) GEORGE R. WICKHAM
Mayor of the City of Glendale

Attest:

(s) G. E. CHAPMAN
City Clerk of the City of Glendale

State of California
County of Los Angeles
City of Glendale—ss.

I, G. E. CHAPMAN, City Clerk of the City of Glendale, do hereby certify that the foregoing resolution was duly adopted by The Council of the City of Glendale, California, at a regular meeting thereof held on the 15 day of June, 1950, and that the same was adopted by the following vote:

Ayes: Baird, Burkhard, Campbell, Wickham, Wright
Noes: None
Absent: None

(s) G. E. CHAPMAN
City Clerk of the City of Glendale

I hereby certify that the foregoing is a true and correct copy of Resolution No. 9264, passed June 15, 1950 on file in the office of the City Clerk of the City of Glendale.

Dated January 27, 1951

G. E. CHAPMAN,
City Clerk

By (s) J. W. FULLER
Deputy

Exhibit C

Moved by Councilman Burkhard, seconded by Councilman Campbell, that the City Attorney is hereby authorized and directed to file with the Public Utilities Commission on behalf of the City, a petition for an order directing construction of a grade separation at the intersection of Los Feliz Boulevard and the Southern Pacific Company railroad right-of-way and apportioning the costs thereof, and that he is further authorized to take all steps and incur such expense as is necessary to represent the City during all proceedings resulting from the filing of such petition. Vote as follows:

Ayes: Baird, Burkhard, Campbell
Noes: None
Absent: Wickham, Wright.

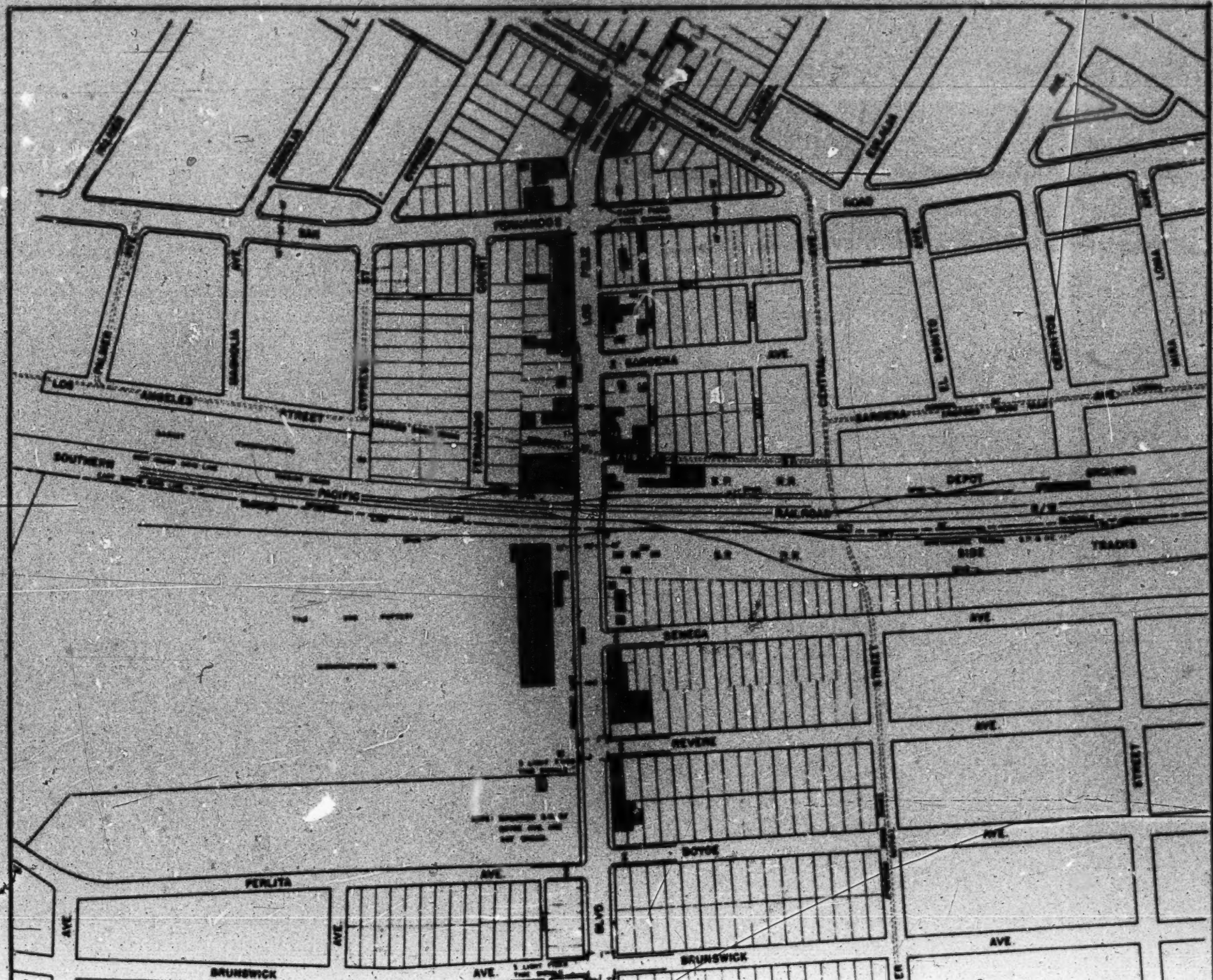
I hereby certify that the foregoing is a true and correct copy of motion on file in the office of the City Clerk of the City of Glendale.

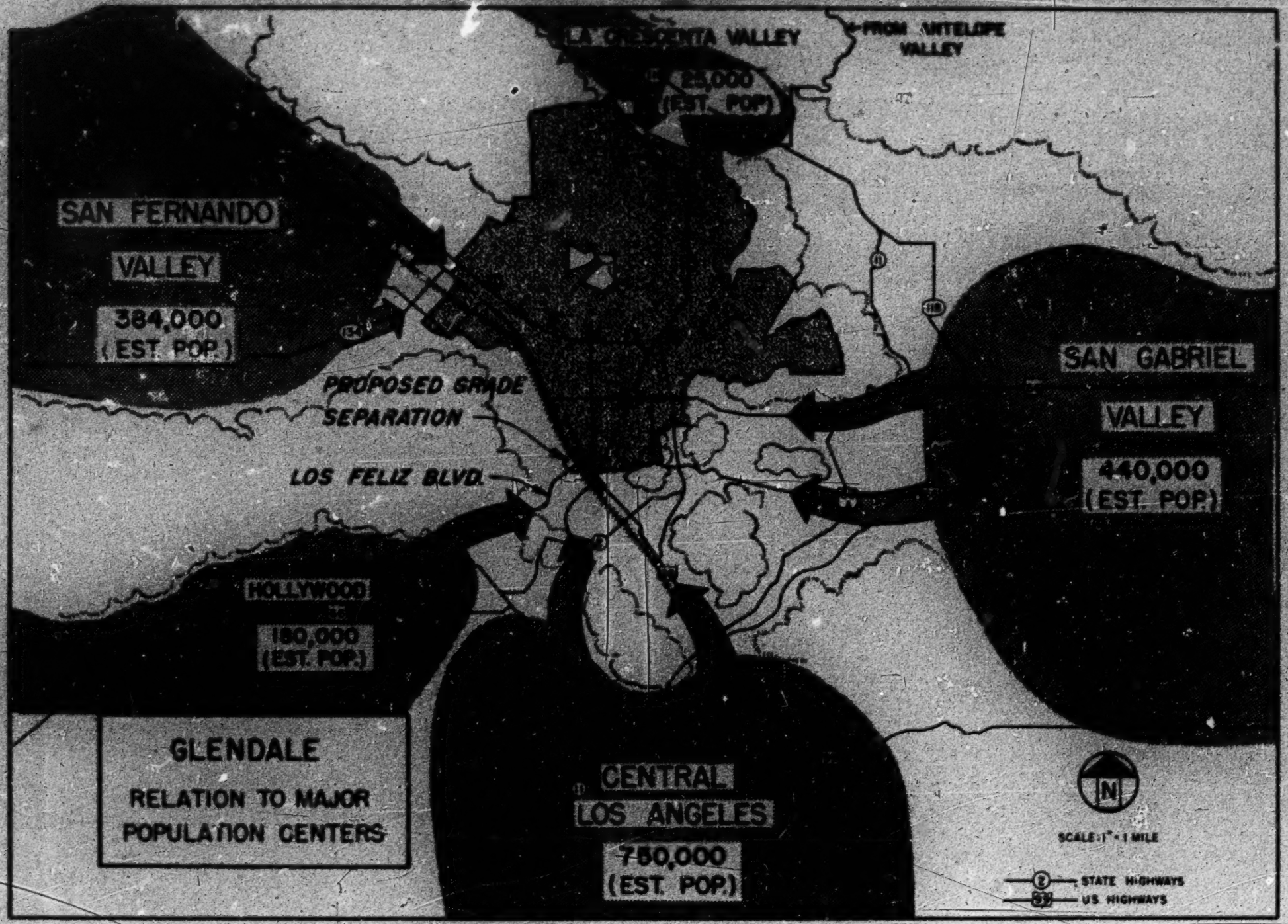
Dated February 23, 1951

G. E. Chapman,
City Clerk

By (s) J. W. Fuller
Deputy

EXHIBIT D


LOS ANGELES STREET
SOUTHERN PACIFIC RAILROAD
DEPOT
TRACKS
SIDE
SENECA
REVERE
BOYCE
PERLITA
BRUNSWICK
AVE.
STREET
BLVD.



Appendix
EXHIBIT E

Exhibit B

Before the Public Utilities Commission of the State of California

In the Matter of the Investigation on the Commission's own motion as to the necessity of effecting a grade separation between the tracks of the Southern Pacific Company and Los Feliz Boulevard in the cities of Los Angeles and Glendale, County of Los Angeles, State of California and the division among the affected parties of the cost incident to such separation.	Case No. 5327

ORDER INSTITUTING INVESTIGATION

Good Cause Therefor Appearing,

IT IS HEREBY ORDERED that an investigation be and it is hereby instituted on the Commission's own motion, for the purpose of determining whether, in the interest of public safety, convenience and necessity, the grade crossing of Southern Pacific Company's tracks with Los Feliz Boulevard in the cities of Los Angeles and Glendale (Crossing No. B-476.8) should be abolished through the construction of a grade separation and for the further purpose of determining the proportions in which the expense of constructing and maintaining such a separation shall be divided among the Southern Pacific Company, the City of Los Angeles, the City of Glendale, the County of Los Angeles, the Department of Public Works, Division of Highways, of

and Councilman John C. Holland and Councilman Ernest E. Debs, and Hugo Winter of City Engineer's Office, and Mr. T. M. Chubb, Chief Engineer and General Manager of the Department of Public Utilities and Transportation; *Hodge L. Dolle* for Department of Public Works, and George Langsner, Engineer, John N. McLaurin for the Department of Public Works, and Herbert J. Williams, Department of Public Works; *Robert W. Walker* and *Joseph R. Cummins* for The Atchison, Topeka and Santa Fe Railway Company; *E. E. Bennett* for the Union Pacific Railroad Company; *Sam R. Kennedy*, Road Commissioner, County of Los Angeles, Charles W. Sprutte, Construction Engineer, Road Department of Los Angeles, for the County of Los Angeles; *John P. Commons* for the Regional Planning Commission, Los Angeles County; *H. F. Holley*, Assistant Chief Engineer for the Auto Club of Southern California, for the Los Angeles County Grade Crossing Committee; *H. Allen Smith*, Assemblyman 43rd District, for the City of Glendale as a member of the California State Assembly, and *Fred G. Seig*, Legislative Representative, for the Order of Railway Conductors, interested parties. *Hal F. Wiggins* for the Commission staff.

OPINION

This matter concerns an existing grade crossing at the intersection of the tracks of the Southern Pacific Company and Los Feliz Road in Glendale and Los Feliz Boulevard in Los Angeles. The tracks, consisting of two standard gauge main tracks, one standard gauge passing track and two standard gauge yard tracks, run in a northwesterly-

southeasterly direction, while Los Feliz, designated as a road in Glendale and a boulevard in Los Angeles, runs in a northeasterly-southwesterly direction. The boundary line between the two cities parallels the tracks in the area of the intersection. Four of the above-mentioned tracks are in Glendale, and one, a yard track, is in Los Angeles. The grade crossing is designated as Crossing No. B-476.8, and the legal description of that portion in Glendale is as follows:

> That portion of the right-of-way (100 feet wide) of the Southern Pacific described in deeds recorded in Book 14094, page 214, and in Book 17837, page 49, Official Records in the office of the Recorder of Los Angeles County, California.

The legal description of that portion of the grade crossing in Los Angeles is as follows:

> A strip of land having a uniform width of 30 feet, its northeasterly line being coincident and identical with the southwesterly [2] line of the Southern Pacific main line right-of-way (100 feet wide), said strip of land extending from the southeasterly line of Los Feliz (100 feet wide) to the Northwesterly line of said Los Feliz.

Applicant, the City of Glendale, requests an order authorizing and requiring the construction of a grade separation at the above-described crossing and further requests that there be in the order a designation of the portions of the work and construction to be done by Glendale, Los Angeles and the Southern Pacific, respectively, as well as an allocation of the costs thereof.

Subsequent to the filing of the application on May 7, 1951, this Commission on September 25, 1951, issued an Order of Investigation to determine whether or not, "in the interest of public safety, convenience and necessity", the grade separation should be constructed and also to determine "the proportions in which the expense of constructing and maintaining such a separation shall be divided among the Southern Pacific Company, the City of Los Angeles, the City of Glendale, the County of Los Angeles, the Department of Public Works, Division of Highways, of the State of California, or other political subdivisions affected . . ."

Public hearings were held in Los Angeles before Commissioner Huls and Examiner Syphers on October 3, November 1 and 29, 1951, during which evidence was adduced, and on the last-named date the matter was submitted with the parties being granted the right to file briefs. Briefs now have been filed and the matter is ready for decision.

At the outset of the hearings the City of Los Angeles[3] introduced into evidence Exhibit No. 1, which is a copy of a resolution of the City Council of Los Angeles, dated October 1, 1951. This resolution adopted a report of a joint committee previously appointed by the council, which report states that since the proposed grade separation lies completely within the City of Glendale and that, therefore, the Public Utilities Commission has no jurisdiction to require the City of Los Angeles to pay any portion of the cost, nevertheless the City of Los Angeles is not opposed to a Commission order which would allocate some costs to the City of Los Angeles subject to the City's agreeing to pay.

The representative of the Department of Public Works of the State of California stated the position of that depart-

ment to be that, since the proposed grade separation would not be of any benefit to a state highway nor benefit the nearest state highway which is approximately 1,000 feet away, the Public Utilities Commission is without jurisdiction to impose any portion of the costs on the Department of Public Works, Division of Highways.

The Chairman of the Board of Supervisors of Los Angeles County, during the course of the hearings, stated that in his opinion the County of Los Angeles would probably contribute to the cost of the proposed grade separation.

As a result of a prehearing conference, at which all of the parties hereto were represented, held prior to the commencement of the formal hearings, a committee was appointed to make a study and prepare an engineering report. This committee, under the chairmanship of the Chief Engineer of this Commission, presented such a report as Exhibit No. 2, various parts thereof [4] being explained by various members of the committee during the course of the hearings.

The Chief Engineer of the Public Utilities Commission, in presenting the first part of this report, outlined the historical background of the matter in question. By Decision No. 17330, dated September 10, 1926, this Commission issued an order directing the elimination of the grade crossings at Los Feliz Boulevard (that here being considered) and also at Brand Boulevard. The decision recommended an underpass be constructed at each location. Subsequently, alleging that finances were not available for such construction, the parties requested dismissal of the proceedings and the matter was dismissed by Decision No. 27098, dated May 28, 1934.

By House Resolution No. 24 of the California Legislature, at its 1949 session, the Commission was directed to initiate proceedings with a view to obtaining grade separations at Los Feliz Boulevard, Glendale-Brand Boulevards, and Fletcher Drive. As a result of this resolution the President of the Public Utilities Commission transmitted a report to the Assembly, dated March 6, 1950, setting forth the results of an engineering study showing the estimated costs, economic justification, and problems of financing of the proposed grade separations. Subsequently, the Legislature, by Assembly Concurrent Resolution No. 88 of the 1951 session directed the Commission to hold hearings on the Los Feliz crossing, and the Commission's investigation was instituted accordingly.

A portion of Exhibit No. 2, relating to the importance of the proposed grade separation and its relation to the freeway plan and to major highway arteries, was presented by the Planning Director of the City of Glendale. It was the testimony of this [5] witness that the proposed grade separation is of utmost importance due to the heavy population of the area and to the daily flow of vehicles and trains at that intersection. This grade separation project was number one on the priority list of the Los Angeles County Grade Crossing Committee in 1923, and the ensuing years have not decreased its importance. Los Feliz Boulevard, according to this witness has reached its capacity and at the present time is carrying an overload. This situation has made it urgent to effect the grade separation. Exhibit No. 5 is a map showing the crossing herein considered and the adjoining area.

In connection with this testimony the City Engineer and Street Superintendent of the City of Glendale presented that part of Exhibit No. 2 relating to traffic checks which were made in the area of the present grade crossing. Likewise, this witness presented Exhibit No. 4, which is a more detailed study of these traffic checks. This exhibit shows the number of motor vehicles and the number of pedestrians at the crossing during 24-hour periods on June 17, 18, and 20, 1951, and also shows the delay in vehicles caused by freight trains during these same periods.

The Principal Traffic Engineer of the City of Los Angeles presented testimony relating to the grade crossing and stated that, in his opinion, a grade separation was needed. He pointed out that the stoppage of traffic at the railroad crossing at Los Feliz would cause a "backlash" of traffic which would affect traffic on San Fernando Road. The distance between the railroad crossing and San Fernando Road is approximately 820 feet, which distance is equivalent to a storage capacity of approximately 38 cars in each of the three lanes of traffic. Checks have [6] disclosed that there are times when more than 38 automobiles in each lane are held up due to a train blocking the crossing and, as a result, the "backlash" of these automobiles congests San Fernando Road. Therefore, in the opinion of this witness, a grade separation would not only relieve congestion at this particular crossing but would also relieve congestion on San Fernando Road.

The Assistant District Traffic Engineer of the California Division of Highways likewise presented testimony relating to a traffic count made for four hours during the evening peak on October 15 and four hours during the morning peak

on October 16, 1951. As a result of this check it was the opinion of this witness that train movements across the existing crossing occasionally affect San Fernando Road traffic but are usually minor in effect. He was of the further opinion that the total benefits to Route No. 4 (San Fernando Road) due to the proposed grade separation on Los Feliz Road would be negligible in amount. Exhibit No. 9 is a report of the study made by this witness.

The Street and Parkway Design Engineer of the Bureau of Engineering, City of Los Angeles, presented testimony as to that part of Exhibit No. 2 relating to the estimate of cost. Under the plan proposed, Los Feliz Boulevard is to pass under the Southern Pacific Company's tracks. There will be two 40-foot roadways separated by a median strip with five-foot sidewalks along each side of the boulevard. The structure will be 105 feet wide and the underpass will have 5% and 6% grades on the westerly and easterly approaches, respectively. During the course of [7] construction there will be a full-width detour for traffic.

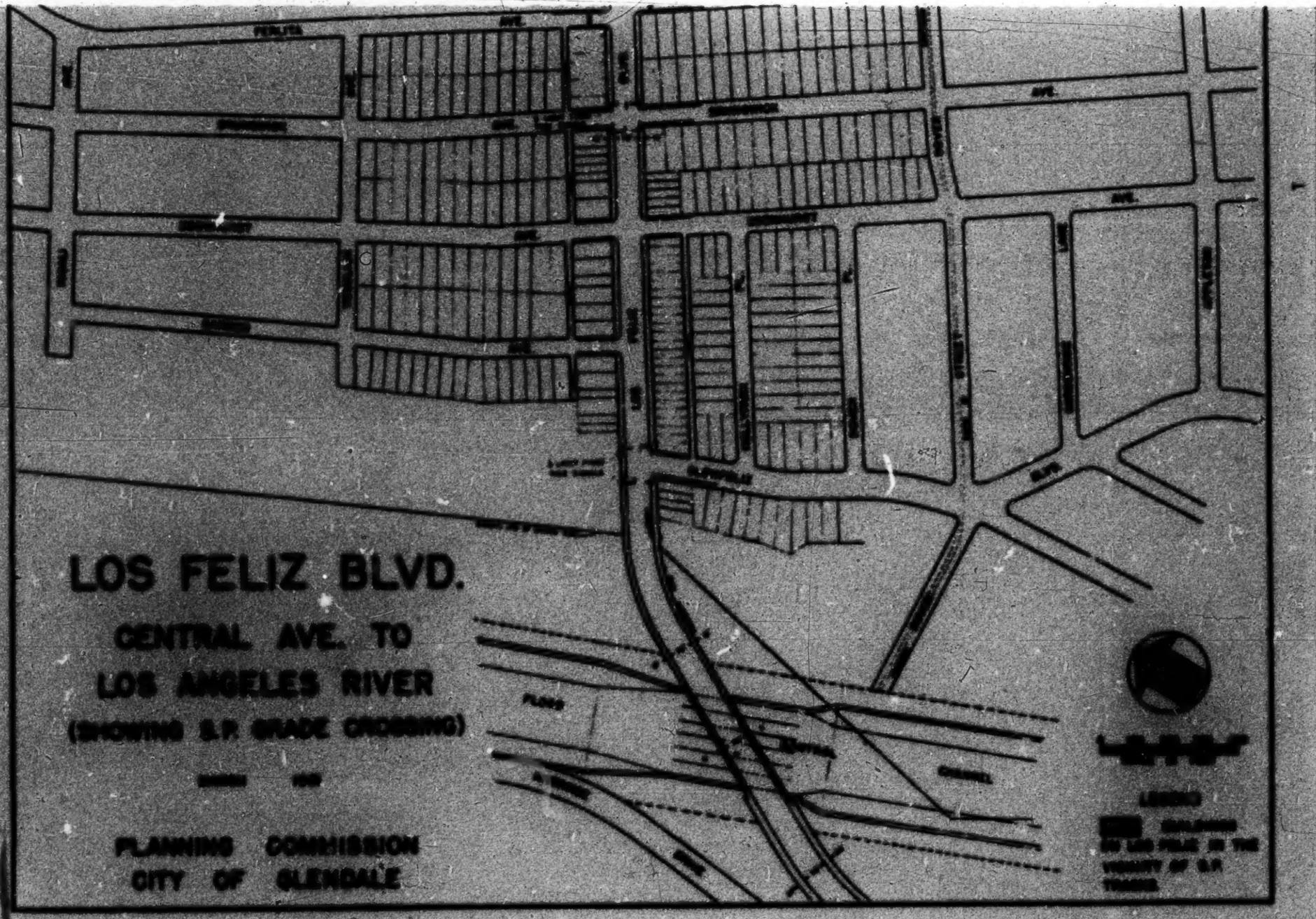
Three possible methods of handling the storm waters were studied and, in the opinion of this witness, the most desirable would be to construct a storm drain which would be a portion of a permanent drainage system in the area. The other two methods were a gravity storm drain in Los Feliz Boulevard and a storm drain based on a storage basin and limited outflow by pump to Los Feliz Boulevard. Inasmuch as the gravity storm drain was estimated to be the least expensive of the three methods, it was used in the estimate of costs presented. The summarized estimate of cost for the underpass is set out hereinbelow:

Bridge	$ 403,300
Streetwork (includes excavation, paving, sidewalk, curb, guardrail)	127,100
Outer highway (South side—between Gardena Ave. and Railroad St. in Glendale)	6,600
Proposed Street (between Fernando Ct. and Los Feliz Boulevard in Glendale)	11,500
Sanitary sewers	14,500
Storm drains	249,100
Retaining walls	52,000
Detour (Street)	23,800
Railroad shoofly	96,500
Railroad signal work	4,000
Right of way	497,000
Total	$1,480,500
Engineering and contingencies (15%)	223,500
Grand Total	$1,713,800

This witness also presented testimony as to the possibility of creating an overpass so that the street would go over the railroad but this method was found to be considerably more expensive than the underpass and accordingly was not recommended.

Exhibit No. 3 consists of photographs, maps, plans and profiles of the proposed grade separation. [8]

A section of Exhibit No. 2, devoted to the economic justification for the proposed separation, was presented by a Supervising Transportation Engineer of the Public Utilities Commission. This portion of the study purported to assign a monetary value to certain benefits which might accrue from the construction of this grade separation. The results of this study are set out hereinbelow:


LOS FELIZ BLVD.
CENTRAL AVE. TO
LOS ANGELES RIVER
PLANNING COMMISSION
CITY OF GLENDALE

Vehicular delay	$57,362	
Railroad operation cost, gatemen, maintenance	14,053	
Accident damages paid by railroad	475	
		$71,890
Depreciation on railroad portion of structure	6,991	
Maintenance on same (Excluding track)	1,620	
		8,611
Net annual savings		$63,279
Above savings capitalized at 3%		$2,109,000
Above savings capitalized at 4%		1,582,000
Above savings capitalized at 5%		1,266,000

It should be noted that a bank official testified that the present cost to Southern Pacific to obtain money on a long-term basis is 5%.

While the foregoing study indicates that the railroad would receive monetary benefits from the construction of the proposed grade separation, this theory was contested by testimony presented by railroad witnesses. The Superintendent of the Los Angeles Division of the Southern Pacific Company testified that the separation of grade at this crossing would be of no benefit to the railroad. He pointed out that the passenger trains using the line do not need to block Los Feliz since they are main line trains and proceed through without any delay. While the passenger [9] trains stop at the Glendale Station, there is ample room for westbound trains without affecting Los Feliz Boulevard, and the eastbound trains can be stopped so as to clear Los Feliz. Freight trains, according to the witness, normally do not stop at the Glendale Station, and he stated there is a company instruction that the maximum number of freight cars on any freight train in the Los Angeles Division be limited to 100 cars. The switching in this area is done during night hours and, according to the testimony of this witness, is of such a small amount that it causes no

serious obstruction to traffic. This witness was of the further opinion that there would be no saving to the company in money paid to employees, for, although a grade separation might save a little time so far as the work of the yard crews is concerned, yet these same crews would be required to be on duty for the same number of hours as at present.

The Road Foreman of Engines of the Los Angeles Division of the Southern Pacific Company described the switching performed in the vicinity of the Los Feliz crossing, and corroborated the testimony of the above witness to the effect that a grade separation would be of no benefit to the railroad inasmuch as the switching movements are very short. He likewise corroborated the testimony that the expense to the railroad in the form of employees' wages would not decrease were a separation constructed.

The last portion of Exhibit No. 2, relating to the availability of critical materials, was presented by the Assistant to the Chief Engineer of the Southern Pacific Company. It was his testimony that the possibility of securing steel and other necessary metals and cement for the project was very uncertain. This [10] witness also testified as to the estimated monetary benefits to the railroad through the construction of a separation, and concluded that the net annual benefit would amount to $5,917. These estimates are set out in Exhibit No. 20, and are listed hereinbelow:

Railroad operation cost (gatemen, maintenance)	$14,053	
Accident damages paid by RR	475	$14,528
Depreciation on RR portion of structure	6,991	
Maintenance of same, excluding track	1,620	8,611
Net annual benefit to railroad		$ 5,917

It will be noted that the figures of the Assistant Chief Engineer of the Southern Pacific Company are identical

with those of the Supervising Engineer of the Public Utilities Commission except that the former has not included any estimate as to vehicular delay, it being his contention that the elimination of delay to motor vehicles would not be a benefit to the railroad. It was the opinion of this witness that the above estimated annual benefit to the railroad, capitalized at 5%, should constitute the maximum amount which the Southern Pacific Company should be required to contribute to the cost of construction of the proposed overpass. This amount is $118,340.

This same witness presented testimony as to the drainage problem in the vicinity. It was his opinion that the drainage problem should be solved before any grade separation is contemplated. He pointed out that Exhibit No. 2 estimates the cost of storm drains to be $249,100. These costs should not be assessed to the structure. This witness further estimated that the storm drains could be constructed for $28,500 instead of the larger figure [11] shown above. This would reduce the cost of the proposed structure from $1,713,800 to $1,460,155. Exhibit No. 21 shows these estimates. It should be noted that the storm drain proposed by this witness would provide drainage for the structure only. His estimate of the cost of this type of storm drain is set out hereinbelow:

Rainfall area 125,630 sq. ft.
Gallons per minute 1,650

Pumphouse & storage box	$15,500
Pumps & electric equipment	10,500
500′ 18″ RCP—in place—$5.00 lin. ft.	2,500
Total	$28,500

Further testimony relating to the drainage problem in this area was presented by an engineer of the Bureau of

Engineering Storm Drain and Design Division of the City of Los Angeles. He presented Exhibits Nos. 22 and 23, drainage maps of the area showing the elevations and the general slope. Concerning the estimate of the Engineer for the Southern Pacific Company as to a proposed drainage system consisting of a sump and pump which would cost approximately $28,500, this witness contended that that estimate did not include any allowance for maintenance and that, in his opinion, a gravity flow system would be more satisfactory and provide a safer drainage operation. This opinion was corroborated by additional testimony presented by the Street and Parkway Design Engineer of the Bureau of Engineering of the City of Los Angeles.

The railroad presented testimony through its Lease Clerk showing historical data as to the railroad right of way in the area. Exhibit No. 10 shows that the Southern Pacific Company [12] acquired the land in 1873, and Exhibits Nos. 11 to 15, inclusive, relate to various deeds and indentures concerning the property rights of way and easements in the area. Additional testimony in this respect was presented by the Chief Draftsman of the Southern Pacific Company which tended to show that the railroad was established in the area prior to the establishment of Los Feliz. It was stipulated between the parties that the grade crossing was first established some time between 1887 and 1912. Exhibits Nos. 16 to 18 are profile and strip maps of the railroad in that area, while Exhibit No. 19 is a blueprint showing the plan of the Southern Pacific Company's station at Glendale as of May 1951.

After a full consideration of all of the evidence and having the benefit of the briefs filed by the parties in this

matter, we hereby find it to be in the interest of public safety, convenience and necessity and that it would be practicable to require the construction of a grade separation at the intersection of the tracks of the Southern Pacific Company and Los Feliz Road and that the plan prepared by the subcommittee, as presented in Exhibit No. 2 and hereinbefore described, sets out the construction which would be most practicable and would best meet the public safety, convenience and necessity in this matter.

Concerning the allocation of costs of this construction, we find from this record that the proposed construction does not concern a state highway and that, accordingly, the Department of Public Works of the State of California is not directly involved. However, we are cognizant of the positions of the City of Los Angeles and of Los Angeles County, as stated during the course of the hearings. [13]

While the railroad contended that the costs should be assessed according to the so-called "benefits" theory, we affirm our holding in Decision No. 47344, dated June 24, 1952, on Application No. 29396, wherein it was held that the authority of this Commission to allocate costs stems primarily from Section 1202 of the Public Utilities Code and is an exercise of the police power on the part of the State of California through the medium of its agency, the Public Utilities Commission. Therefore, we are not bound to follow the so-called "benefits" theory, although it is appropriate to observe that the proposed grade separation will obviously be of benefit to the railroad. Both the testimony of the Supervising Transportation Engineer of the Public Utilities Commission and of the Assistant to the Chief Engineer of the Southern Pacific Company, as set

out hereinbefore, show various estimated benefits. The City of Glendale in its brief takes the position that, in the absence of the railroad, the present highway would be adequate and no grade separation would be necessary. Therefore, that City contends that all of the costs should be borne by the railroad. We do not subscribe to this contention, for the evidence shows that the great increase in automotive vehicular traffic is one of the reasons for constructing a grade separation.

According to the evidence the estimated cost of the entire project amounts to $1,713,800. Of this amount, $249,100 is for a gravity storm drain extending from a point easterly of the underpass to the Los Angeles River. Another estimate submitted shows that a sump and pump storm drain for the structure alone could be constructed for $28,500. We are of the opinion [14] and hereby find that, while the more elaborate gravity storm drain is a desirable construction, yet it would provide drainage for more than the structure area. Accordingly, the entire cost of such a storm drain should not be included in any costs which are apportioned to the railroad. Deducting the difference in cost of the storm drains, the allocable cost of the structure is hereby found to be $1,493,200. This amount of the cost should be allocated amongst the Southern Pacific Company, the Cities of Glendale and Los Angeles and the County of Los Angeles. In making an allocation of these costs we have in mind the contention of the City of Los Angeles on brief that the proposed grade separation would be entirely within the City of Glendale and that that City, therefore, should bear the larger allocation so far as the municipal entities are concerned. Nevertheless, the evidence in this case shows

that the westerly approach to the underpass will be in the City of Los Angeles and further that all of the traffic using this underpass either goes to or from the City of Los Angeles. In addition, one of the spur tracks which is directly involved is now within the City of Los Angeles. We likewise have in mind the position of the Chairman of the Board of Supervisors of the County of Los Angeles to the effect that the County would probably contribute to the cost. Therefore, in view of all of the evidence in this case and considering the positions of the respective parties hereto, we hereby find that, of the allocable cost of $1,493,200, the Southern Pacific Company should bear 50 per cent, or $746,000, the County of Los Angeles 25 per cent, or $373,300, and the Cities of Glendale and Los Angeles 12½ per cent each, or $186,650 apiece. [15]

ORDER

Application as above entitled having been filed, public hearings having been held thereon, and the Commission being fully advised in the premises,

IT IS ORDERED that the City of Glendale be authorized and it hereby is directed to separate the grades of Los Feliz Road and the tracks of the Southern Pacific Company in the manner and at the location more particularly described in the foregoing opinion and substantially in accordance with the plan introduced in this proceeding, subject to the following conditions:

1. Of the total cost of the proposed structure, as set out in the foregoing opinion which is estimated to be $1,493,200, fifty per cent (50%) shall be borne by the Southern Pacific Company, twenty-five per cent

(25%) by the County of Los Angeles, twelve and one-half per cent (12½%) by the City of Glendale, and twelve and one-half per cent (12½%) by the City of Los Angeles.

2. Upon completion of the construction of said grade separation, the cost of maintaining those portions of the separation, which for the purpose of this decision shall be referred to as the superstructure and be deemed to be everything above the bridge seats, shall be borne by the Southern Pacific Company. The remainder of the maintenance of the grade separation structure shall be borne by applicant.

3. The City of Glendale shall prepare detail plans and specifications for the construction of the grade separation, as referred to above, to carry Los Feliz Road under the tracks of Southern Pacific Company in the City of Glendale, the City of Glendale to submit said plans and specifications to the other interested parties and to the Commission for its approval within one hundred and twenty (120) days from the date hereof. Should they fail to agree on the plans, such disagreement shall be reported to the Commission, whereupon an appropriate order will be entered.

4. The City of Glendale shall undertake the construction of the separation referred to herein and upon receiving the approval of the Commission of the plans to be submitted, shall begin construction of the separation and shall be responsible for its completion. [16]

5. Upon completion of the various phases of this project as the monies become payable and upon the presentation of proper bills therefor, the County of Los Angeles, the City of Los Angeles, and the South-

ern Pacific Company shall pay to the City of Glendale the costs apportioned to said agencies by this order.

6. The grade separation structure shall be constructed with clearances conforming to the provisions of General Order No. 26-D of this Commission.

7. The construction herein ordered shall be commenced within one year and completed within two years after the date hereof, unless further time is granted by subsequent order.

8. Within thirty (30) days thereafter, applicant shall notify this Commission in writing of the completion of the construction of said grade separation and of its compliance with the conditions hereof.

The effective date of this order shall be twenty (20) days after the date hereof.

Dated at San Francisco, California, this 30th day of June, 1952.

R. E. MITTELSTAEDT
President
HAROLD P. HULS
KENNETH POTTER
PETER E. MITCHELL
Commissioners

Certified as a True Copy
[Seal] NOEL COLEMAN
Asst. Secretary,
Public Utilities Commission
State of California [17]

Commissioner Justus F. Craemer, being necessarily absent, did not participate in the disposition of this proceeding.

Exhibit D

Before the Public Utilities Commission of the State of California

In the Matter of the Application of the CITY OF GLENDALE, a municipal corporation, for an order or orders authorizing and requiring the construction of a grade separation of the crossing of Los Feliz Road and the railroad of the SOUTHERN PACIFIC COMPANY, designating the portions of the work to be done respectively by said City, THE CITY OF LOS ANGELES and said railroad corporation, and allocating the cost thereof among said Cities and said roalroad corporation.	Application No. 32385
In the Matter of the Investigation on the Commission's own motion as to the necessity of effecting a grade separation between the tracks of the Southern Pacific Company and Los Feliz Boulevard in the cities of Los Angeles and Glendale, County of Los Angeles, State of California, and the division among the affected parties of the cost incident to such separation.	Case No. 5327

APPLICATION OF SOUTHERN PACIFIC COMPANY FOR REHEARING

To the Honorable, The Public Utilities Commission of the State of California:

Southern Pacific Company, a corporation, respectfully applies for a rehearing in the above entitled proceedings,

and asks that Decision No. 47420 rendered therein under date of June 30, 1952 be set aside and annulled.

Southern Pacific Company represents that said decision is unlawful in that the Public Utilities Commission has not regularly pursued its authority, has acted beyond and in excess of its jurisdiction, and has violated rights of Southern Pacific Company under [1] the Constitution of the United States, and of this State, as follows:

PART ONE

I

That in its decision and order the Commission failed to find upon the material facts at issue, although undisputed evidence was submitted to the Commission at the hearing of said application and case.

II

That the findings of the Commission, and its order set forth in said decision and order are not supported by undisputed evidence submitted to the Commission.

III

That said decision and order is not supported by the evidence, but is contrary thereto, and the findings and conclusions of the Commission, upon which said decision and order is predicated, are, therefore, without foundation, contrary to law and void.

IV

That said decision and order made by the Commission cannot be based upon facts found by the Commission.

V

That in said decision and order the Commission exceeded its jurisdiction in allocating 50% of the allocable costs to Southern Pacific Company, and the said decision and order of the Commission imposing upon Southern Pacific Company one half or 50% of the allocable cost of the underpass was arbitrary and unreasonable and a void exercise of the police power.

VI

That said decision and order, if permitted to become effective, will confiscate Southern Pacific Company's property and deprive it of its property, without due process of law, and deny Southern [2] Pacific Company the usual protection of the law, contrary to the provisions of the 14th Amendment to the Constitution of the United States, and contrary to the provisions of the Constitution of the State of California.

VII

The decision and order of the Commission is so arbitrary as to violate the due process clause of the 14th Amendment of the Federal Constitution, and Article 1, Section 13 of the California Constitution, and also unduly burdens Interstate Commerce in violation of the commerce clause of the Federal Constitution.

VIII

The decision and order of the Commission is invalid because it violates such requirements as that of Article 1, Section 14 of the California Constitution, which prohibits the taking of property for public use without due compensation.

IX

The decision and order of the Commission, in apportioning costs to the Southern Pacific Company in the amount of 50% of $1,493,200., has placed an undue burden on Interstate Commerce, in violation of the commerce clause of the Federal Constitution, and violates the policy in favor of economical railroad operation set forth as the National Transportation Policy (54 Statutes at Large, 899).

X

The Commission has acted so arbitrarily and unreasonably in apportioning costs to the Southern Pacific Company at 50% of the estimated allocable costs of $1,493,200 so as to deprive Southern Pacific Company of the equal protection of the law and of its property without due process of law, in violation of the 14th Amendment to the Federal Constitution, and Article 1, Sections 13 and 14 of the California Constitution. [3]

XI

The Commission's action in connection with the apportionment of costs of the proposed grade separation is arbitrary because it is not based upon any evidence in the record, and the Southern Pacific Company has been denied a fair hearing, all in violation of the substantive or procedural due process of law required by the 14th Amendment to the Federal Constitution and by Article 1, Section 13 of the California Constitution.

XII

That if said decision and order becomes effective and final, Southern Pacific Company will suffer detrimental and irreparable damage and great financial loss.

NOTE: The term "Los Feliz Road" and "Los Feliz Boulevard" relates to the same crossing and has been used interchangeably by the Public Utilities Commission. In the heading of Application 32385 the Commission has used "Los Feliz Road" while in Case No. 5327 the Commission has used "Los Feliz Boulevard." These references refer to the same highway and have been so treated by all the parties. [4]

PART TWO

XIII

A Rehearing Should Be Granted Pending the Determination of Important Questions of Law

The Los Feliz matter in Glendale (Application 32385 and Case 5327) arose after the filing and first hearing of the so-called Washington Boulevard matter in the City of Los Angeles, Application No. 29396, which, on June 24, 1952, resulted in Decision No. 47344. The Washington Boulevard case has been recognized as a test case in these matters.

The parties in the Washington Boulevard matter have until 30 days after June 24, 1952, or July 26, 1962, within which to apply to the Supreme Court of California for a writ of certiorari or review (Section 1756 of the Public Utilities Code). Since the decision in the Los Feliz Boulevard matter was based on and specifically followed the Washington Boulevard decision in rejecting the "benefit" theory (Opinion page 14, lines 1-11), it appears that the present Los Feliz Boulevard decision No. 47420 in Application No. 32385 and Case No. 5327 should be annulled and set aside until there is a final judgment after review of the courts in the Washington Boulevard Application No. 29396, Decision No. 47344.

This application for rehearing in this, the Los Feliz Boulevard case in Glendale will be on file before any application to the California Supreme Court for a writ of certiorari or review will be filed in the Washington Boulevard Application No. 29396, Decision No. 47344, because of the difference of time elements in the statutes. However, by the time this application for a rehearing is decided, it is expected there will be on file in the California Supreme Court an application for a writ of certiorari or review in the Washington Boulevard case. Until that matter is decided by the courts, including the applicability of the "benefit" theory of apportioning [5] costs, it appears the Southern Pacific Company should protect its record, and in the event this application for a rehearing is denied it further appears it will be necessary to file a similar application for a writ of certiorari or review.

It is submitted that if the Commission believes it should deny this application for rehearing on all other grounds, still the Commission should grant a rehearing and defer further action until such time as the Washington Boulevard Application No. 29396, Decision No. 47344 is reviewed by the courts and becomes final. Otherwise, the only safe alternative for Southern Pacific Company is to proceed as provided in Section 1756 of the Public Utilities Code and take what steps that can be taken to prevent this Los Feliz Boulevard Decision No. 47420 from becoming final until the courts have reached a final conclusion on the Washington Boulevard Decision No. 47344. It does not seem proper that the parties be put to the expense and labor that will result if an application for rehearing is denied in this matter.

XIV

The Commission Has Incorrectly Stated Facts in Its Decision

A. On page 2 of the Opinion there appears the following language:

> "The boundary line between the two cities (Glendale and Los Angeles) parallels the tracks in the area of the intersection." (Opinion, page 2, lines 15-16)

while the evidence showed the boundary line to be on the west side of the right of way of the Southern Pacific Company (Maps attached to Exhibit 3). The above quoted language should be compared to the language on page 15, lines 9-18 of the Opinion. The above quoted language should be corrected in order to state the true facts in view of the position taken by the City of Los Angeles. (Exhibit 1 and Opinion, page 3, last line to page 4, line 11). [6]

B. On page 2 of the Opinion there appears the following language:

> "Four of the above mentioned tracks are in Glendale, and one, a *yard* track, is in Los Angeles." (Italics added).

while on page 16, there appears the following language:

> "In addition, one of the *spur* tracks which is directly involved is now within the City of Los Angeles." (Italics added).

It is believed both transcript references refer to the same track since there appears to be only one track in the City of Los Angeles. The Commission should use the same identifying language, or confusion will result. Usually a yard track

is within a railroad right of way, while a spur track is outside of the right of way. In view of the fact the boundary of the Cities of Glendale and Los Angeles is found on the west side of the railroad right of way, and the fact the City of Los Angeles took the position the railroad tracks were not located within the City of Los Angeles, (Opinion page 4, lines 1-11 and page 15, lines 9-18) this use of terminology becomes very important. The Southern Pacific Company desires an accurate and adequate record. It is submitted the above use of yard track should be corrected to spur track or the Commission point out with certainty wherein the two tracks are different as well as the location of each. (See also Rep. Tr. p. 409-410 and p. 418, l. 6-11). It is submitted the track in the City of Los Angeles was the spur track of Gladding-McBean Company (Rep. Tr. p. 245, l. 16-21) and should be properly named. (See also Exhibit 19).

C. On page 13, lines 3-7 of the Opinion there appears the following:

> "Additional testimony in this report was presented by the Chief Draftsman of the Southern Pacific Company which tended to show that the railroad was established in the area prior to the establishment of Los Feliz."

It is believed this statement should be correctetd to show that con- [7] struction of the railroad started in 1873 and the first train was operated across the site of the present Los Feliz Boulevard on April 20, 1874. (Rep. Tr. page 237, line 15 to page 238, line 21—See also Exhibit 16 that shows the railroad profile with railroad track in place in 1876.)

This matter is of particular importance in the theory of prior user or first user and the allocation of costs based upon that theory. Further it should be noted the applicant, City of Glendale, in its opening Brief on page 3, lines 14-15, stated:

> "The Southern Pacific main line tracks in the vicinity of Los Feliz were constructed prior to 1876."

D. There is an erroneous computation on page 15, lines 24-6 of the Opinion. The Opinion reads:

> "We hereby find that, of the allowable cost of $1,493,200, the Southern Pacific Company should bear 50 per cent, or $746,000 * * *."

In computing 50% of $1,493,200. the result is $746,600. Further if the amounts as set forth in the Opinion (page 15, lines 25-8) are added together, the total is $600 short of the overall figure of $1,493,200.

XV

The Commission Has Failed to Find Upon Material Facts at Issue Although Undisputed Evidence Was Submitted to the Commission.

The Commission's method of reciting and summarizing evidence of a particular witness leaves the record in a confused state when one attempts to ascertain just what the Commission found in the way of facts and ultimate facts.

There is little statutory direction upon this subject. Section 1705 of the Public Utilities Code provides: [8]

> "After the conclusion of the hearing, the Commission shall make and file its order, containing its decision."

Section 1757 of the Public Utilities Code provides in part:

> "The findings and conclusions of the Commission on questions of fact shall be final . . . *Such questions of fact shall include ultimate facts* . . ." (Italics added.)

Thus by direction of statute it appears the legislature requires the Commission to decide upon not only ultimate facts but all questions of fact. (See also *Southern Pacific Co vs. Railroad Commission* (1939) 13 Cal. (2) 125, 129 and cases cited therein.)

The necessity for findings by an administrative agency may rest upon constitutional grounds (*Wichita R. & L. Co. v. Public Utilities Comm.*, 260 U.S. 48 (43 S.Ct. 51, 67 L. Ed. 124); *Mahler v. Eby*, 264 U.S. 32 (44 S.Ct. 283, 68 L. Ed. 549)), or, as here, upon a statutory requirement. The basic purposes of findings are to aid the court in determining whether there is sufficient evidence to support them (*Atchison, T. & S. F. Ry. Co. v. Commerce Comm.*, 335 Ill. 624 (167 N.E. 831)); to enable the court to examine the decision of the administrative agency in order to determine whether it is based upon a proper principle (*United States v. Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499 (55 S.Ct. 462, 79 L.Ed. 1023)); and to apprise the litigants or parties in regard to the reason for the administrative action as an aid to them in deciding whether additional proceedings should be initiated and, if so, upon what grounds (*Beaumont, S. L. & W. Ry. Co. v. United States*, 282 U.S. 74, 86 (51 S.Ct. 1, 75 L. Ed. 221)). Although administrative findings must conform to the statutes governing the particular agency, they need not be stated with the formality required in judicial proceedings (*Meeker & Co. v. Lehigh Valley R. Co.*, 236

U.S. 412 (35 S.Ct. 328, 59 L. Ed. 644); *Cantrell v. Board of Supervisors*, 87 Cal. App. 2d 471 (197 P.2d 218)).

The Opinion of the Commission, commencing at the bottom paragraph of page 5 and extending to the top of page 13, recites and [9] summarizes evidence of various witnesses. It cannot be determined whether the evidence of these witnesses as summarized was approved or rejected by the Commission. This summarizing of witnesses' evidence is interesting reading but it cannot be ascertained from either the Opinion, the decision or the order if the Commission found the recited facts to be true or false.

Further, when the Commission used the phrase on page 13, line 13, as follows:

"After a full consideration of all the evidence."

was the Commission referring only to the evidence of witnesses summarized in the Opinion, or that evidence presented in the application and case?

It is submitted the parties in this matter are entitled to know in the decision and order the facts found by the Commission as well as ultimate facts. The recital method of summarizing evidence of various witnesses is not a compliance with the statute, is arbitrary, unreasonable and void. This method of summarizing the evidence of various witnesses leaves the record with nothing in it as far as a finding of fact or ultimate fact. The statute provides a method and a procedure for decisions and orders and it is submitted the Commission should follow the statutes and cases upon the subject (*Southern Pacific Co. vs. Railroad Commission* (1939) 13 Cal.(2) 125). To not do so is arbitrary, unreasonable and discriminatory. It is further submitted the Commission is rendering such a decision as is in

question here has not, "regularly pursued its authority" (Public Utilities Code, Section 1757).

The state of the decision and order is such that there are no findings of fact or ultimate fact as required by Section 1757 of the Public Utilities Code. Although the evidence was uncontradicted that there is a delay to vehicular traffic in Los Feliz Boulevard, [10] and that the separation of grades should eliminate such delay, there is no finding of fact or ultimate fact upon the subject. The same situation prevails as far as accident hazard is concerned where the crossing equipped with crossing gates had a successful record as far as accidents are concerned (Rep. Tr. p. 338, l. 8-10 and Exhibits 2 and 20), and yet there is no finding of fact or ultimate fact upon the subject. The net result of an examination of the Opinion, decision and order is that there are no findings on both questions of facts and ultimate facts.

Neither the decision nor opinion find as a matter of fact or ultimate fact that Los Feliz Boulevard is a road of considerable importance (Rep. Tr. p. 20, line 2) leading principally to many population centers in Southern California; that Los Feliz Boulevard is a major traffic artery and is a place where traffic of major importance to the metropolitan area will flow in increasing volume (Rep. Tr. p. 23, lines 19-20); that traffic from Antelope Valley to the Los Angeles Harbor (Rep. Tr. p. 26, lines 20-22) from the desert, beach and mountain areas (Rep. Tr. p. 29) use Los Feliz Boulevard in large numbers, that travel to and from the interior valley use Los Feliz Boulevard (Rep. Tr. p. 30), that Los Feliz Boulevard is a very important segment of the Master Highway Plan (Rep. Tr. p. 27, lines 2-3) that Los Feliz Boulevard is an important road (Exhibit 2 and

Rep. Tr. p. 185, lines 12-26 and p. 195, lines 5-6), although the evidence was uncontradicted upon the subject. Further, neither the decision nor Opinion find that state gas tax funds will be used to finance the project.

Neither the Opinion nor decision find that the railroad has ceased to be the prime instrument of danger and the main cause of accident, although the evidence was uncontradicted.

Neither the Opinion nor decision find that the growth of the community in which the grade separation was proposed was not [11] mainly the result of the transportation facilities offered through the railroad.

Likewise, neither the Opinion nor decision find that the separation of the grade crossing was not a normal incident to the growth of rail operation.

Further, neither the Opinion nor the decision find that the community's growth and highway improvement would not benefit the railroad.

In addition, the Commission in its decision and Opinion failed to find that the highways are not feeders of rail traffic, and that the avoidance (by grade separation) of traffic interruptions incident to a crossing at grade is now of far greater importance to the highway users than it is to the railroad.

The above omissions of findings of fact and ultimate fact on uncontradicted evidence results in a conclusion that the Commission has acted arbitrarily, and that Southern Pacific Company has been denied a fair hearing, all in violation of the substantive or procedural due process of law required by the 14th Amendment to the Federal Constitution and by Article 1, Section 13 of the California Constitution.

XVI

The Findings of the Commission Are Not Supported by Undisputed Evidence

The findings of the Commission are found in a one sentence paragraph (on page 13, lines 13-22). The material portion of the findings are:

> "We hereby find it to be in the interest of *public safety*, convenience and necessity and that it would be practicable to require the construction of a grade separation." (Italics added.) (Opinion, page 13, lines 15-17.)

The evidence summarized in the Opinion does not relate to public safety. Public safety was not an issue developed before the Com- [12] mission. What was before the Commission was the elimination of vehicular delay. A portion of the evidence of the Planning Director of Glendale was summarized in the Opinion at pages 5 and 6. The following uncontradicted evidence should have been added that supported the application:

> "that the substantial delay, inconvenience and losses of time and money be eliminated." (Rep. Tr. p. 21, lines 20-22.)

The controlling motivation for a grade separation was well set forth in a question asked by the Assistant City Attorney of Glendale, the applicant, of the Principal Traffic Engineer of the City of Los Angeles as follows:

> "Q. In other words, the benefits to Glendale of a grade separation would be the elimination of the blocking at San Fernando Road; that is the principal additional benefits you think Glendale gets from the grade separation? A. Yes, and I think the State gets it

because of the increased volume of traffic that they are able to move on San Fernando Road." (Rep. Tr. p. 191, lines 14-19.)

There was no safety problem at Los Feliz Road because of the crossing gates installed at the railroad tracks. (Rep. Tr. p. 248, l. 25 to p. 250, l. 2.)

The finding of "public safety" is entirely unsupported by the record and the evidence. What the evidence supported was elimination of numerous delays to vehicles while the trains crossed Los Feliz Boulevard (Exhibit No. 2). This vehicular delay does not support any finding of public safety.

The very facts of the extended proof in this matter on vehicular delay was recognized in the case of *Nashville C. & St. L. R. Co. vs. Walters* (1934) 294 U.S. 405, 79 L. Ed 949, 959 wherein the court said:

> "The main purpose of grade separations therefore is *now* the furtherance of uninterrupted, rapid movement by motor vehicles." (Italics added.) [13]

Thus for the Commission to make a finding of public safety which was not supported by the evidence or the law is arbitrary, unreasonable and without authority of law.

It is to be remembered that although Section 1757 of the Public Utilities Code provides:

> "The findings and conclusions of the Commission on questions of fact shall be final and shall not be subject to review except as provided in this article."

That Section 1760 of the Public Utilities Code provides:

> ". . . the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the Commission material to the deter-

mination of the constitutional question shall not be final."

There must be subordinate findings supported by the evidence to support the ultimate finding of the Commission. In *Southern Pacific Company vs. R. R. Comm.* (1939) 13 Cal.(2d) 125, it was pointed out that the statutory requirements as to "findings" to be made by the Commission are practically identical with those contained in the Workmen's Compensation Act, and that findings made without evidence will be annulled.

It is submitted the Commission should properly find upon the evidence (see Exhibit 2) that there was not public safety involved in the matter before the Commission. The Commission's finding was not supported by the evidence, and the evidence was entirely to the contrary. Therefore, the finding of the Commission is void and null, and the Southern Pacific Company was not accorded a fair hearing in that the due process clause was violated.

There is a further matter of the fact that materials will be unavailable during the time the construction work must be completed. See paragraph XIX entitled "The Commission's order has failed to consider the evidence relating to the steel and copper restrictions with the result the order requires impossibilities." [14]

XVII

The Commission Unlawfully and Improperly Exercised the Police Power Under the Particular Facts in This Matter

A. Los Feliz Boulevard crossing of the Southern Pacific tracks is a place where crossing gates have been maintained for many years. There were no operating benefits

to the railroad other than shown on Exhibit 20 (see also summary of evidence of Assistant to Chief Engineer of Southern Pacific Company, Opinion page 1, lines 1-25), and the total amount of benefit that accrued to the Southern Pacific Company was $118,340.00. This total should be compared to that allocation of cost determined by the Commission of $746,000.00 (although that figure was given by the Commission, there appears to be an error of $600.00 in the computation).

How can this difference be explained? The Commission states it will not follow the "benefit" theory but will rely upon the police power (Opinion page 14, lines 1-11). There is no tangible evidence to support the Commission's decision to assess the railroad 50%, nor does the Commission state in its decision how it reached the 50% proportion. Likewise, the Commission has not explained how it reached a 50% proportion in applying Section 1202 (c) of the Public Utilities Code.

The Commission in its opinion in the Los Feliz Boulevard Application No. 32366, Case 5327 and Decision No. 47420 stated in the Opinion on page 14, lines 1-8 as follows:

> "While the railroad contended that the costs should be assessed according to the so-called 'benefits' theory, we affirm our holding in Decision No. 47344, dated June 24, 1952, on Application No. 29396, wherein it was held that the authority of this Commission to allocate costs stems primarily from Section 1202 of the Public Utilities Code and is an exercise of the police power on the part of the State of California through the medium of its agency, the Public Utilities Commission. Therefore, we are not bound to follow the so-called 'benefits' theory, although it is appropriate to observe

that the proposed grade separation will [15] obviously be of benefit to the railroad."

Further, in the Washington Boulevard Application No. 29396, Decision No. 47344, the Commission in that Opinion on page 16, lines 10-23 said the following:

"The authority of this Commission to allocate costs, as designated in Section 1202 of the Public Utilities Code, supra, is an exercise of the police power on the part of the State of California through the medium of its agency, the Public Utilities Commission. We hold that the law is well established that under the exercise of the police power a state may regulate the crossings of railroads with its highways, and may require grade separations to be erected and maintained, apportioning the costs in the exercise of its sound discretion. (*Erie Railroad Company v. Board of Public Utility Commissioners*, 1920, 254 U.S. 394; 65 L. ed. 322; *Chicago, Milwaukee and Saint Paul Railway Company v. Minneapolis*, 1914, 232 U.S. 430; 58 L. ed. 671; *Missouri Pacific Railway Company v. Omaha*, 1914, 235 U.S. 121; 59 L. ed. 157; *Lehigh Valley Railroad Company v. Board of Public Utility Commissioners*, 1928, 278 U.S. 24; 73 L. ed. 161)."

and on the next pages (page 17, line 26 to page 18, line 6) the Commission said the following:

"In the instant case, the proposed widening of Washington Boulevard is to meet local transportation needs, and the City's contribution thereto must come entirely from local funds.

"In Decision No. 43374, supra, we said 'the railroad has a continuing obligation to participate in the cost of such an improvement as is contemplated'. While we hold that the allocation of costs herein is an exercise

of the police power, and that we are not bound to follow the benefit theory, we observe that this proposed improvement is not without benefits to the railroad."

The above statement in the Washington Boulevard Application No. 29396, Decision No. 47344 that the widening was to meet local transportation needs should be compared to uncontradicted evidence in the Los Feliz Boulevard Application No. 32385, Case No. 5327, Decision No. 47420 that Los Feliz Boulevard was a road of considerable importance (Rep. Tr. p. 30, line 2) leading principally to many population centers in Southern California, that Los Feliz [16] Boulevard is a major traffic artery and is a place where traffic of major importance to the metropolitan area will flow in increasing volume (Rep. Tr. p. 23, lines 19-20), that traffic from Antelope Valley to the Los Angeles Harbor (Rep. Tr. p. 26, lines 20-22) from the desert, beach and mountain area (Rep. Tr. p. 29) use Los Feliz Boulevard in large numbers, that travel to and from the interior valleys use Los Feliz Boulevard (Rep. Tr. p. 30), that Los Feliz Boulevard is a very important segment of the Master Highway Plan (Rep. Tr. p. 27, lines 2-3) and that the proposed separation of Los Feliz Boulevard is not to meet local transportation needs (Exhibit 2 and Rep. Tr. p. 185, lines 12-26).

The above facts of the Los Feliz Boulevard matter fit squarely within the latest case in the Supreme Court of the United States of *Nashville, C. St. L. R. Co. vs. Walters* (1935) 294 U.S. 405, 79 L. Ed. 949, 956, 959-60.

B. The Commission has overlooked in both the Los Feliz Boulevard Decision 47420 and Washington Boulevard

Decision 47344 the manner of municipal financing. Cities and counties have available and use the so-called state gas tax funds to finance these projects. (See Subdivisions 2, 6 and 7, Article XXVI of the Constitution and Statutes passed pursuant thereto). The testimony of Mr. Joseph, the Chairman of the Board of Supervisors of Los Angeles County stated as follows:

"I do feel that we could contribute a substantial amount, due to the fact that we gave to the Cities of Los Angeles County outside of the gasoline tax money, outside of the moneys given based on a formula, which is each and every year, we gave them, last year, an extra $1,750,000 or $1,750,000 dollars. That was above that system, the money that we had given based on a formula basis. From that amount I would say that the Board would give quite a substantial amount towards this cost.

"Q. How is that programmed each year? Do you make a budget?

"A. Yes. [17]

"Q. And you spell out how the money shall be spent?

"A. That is right. We spell out to this extent, that we gave to the cities last year the moneys from the gasoline tax, their share, at least, I would say on this Formula 316, and then we had over that amount, we had $1,750,000. That, of course, we just gave them, and although we did earmark moneys to be spent in certain projects, not very much, but some.

"Q. Does the Board have that authority to assign this money, this gasoline money? A. Above that three-sixteenths. Well, we really have all of it. We have the authority to do all of it, but we do have a general agreement that we contribute a certain amount unear-

marshal, learns that up to the various cities." (Rep. Tr. 926, l. 25 to p. 930, l. 22.)

C. The Southern Pacific Company urges the Commission to consider the language in the most recent case in the Supreme Court of the United States upon the subject of allocation of costs on grade separations. This case of *Northern Pac. R. R. Co. vs. Walters* (1929) 279 U.S. 407, 73 L. Ed. 769, 49 S. Ct. 340 was discussed in the decision and order [illegible] although reference was made to the Washington Boulevard Application No. 19262, Decision No. 17344 which is found on page [illegible] discussed that case.

The Commission's attention is directed to the fact that the California cases on police power decided before the *Northern Pac.* case [illegible] recognized that a change in the handling of the allocation of costs could come in the future by using language that first drew the contours of police power to public safety, and also language that recognized the "benefit" theory.

In *City of San Jose vs. Railroad Commissioners* (1917) 175 Cal. 289, 295, 296, the Court in a grade separation case involving the Southern Pacific Company in San Jose at "The Alameda" said:

> "The right of apportionment of the cost by the Commission to the parties benefited by the crossing is a proper element of this cognate power" (of the Commission).

Then the court went on to cite with approval a Milwaukee case [18] as follows:

> "The growth of the city and of the railroads has been coincident, interdependent, inseparable, and from this growth has arisen *the great danger of grade crossing.*

"Why should not the expense of removing that danger be equitably shared by the different agencies whose joint growth has brought it about."

The above language showed great danger of grade crossing and benefits like in nearly the same situation that prevailed in the United States as a whole in the period around 1917 and was recognized in the cases cited by the Commission in the Washington Boulevard Application No. 29008, Decision 17344 (page 16). The *Erie* case cited there was decided in 1914, the *Minneapolis* case was decided in 1914, the *Omaha* case was decided in 1914 and the *Lehigh Valley* case was decided in 1922.

It was the *Southern* case (234 U.S. 492, 79 L. Ed. 948, 950, 959-60), decided in 1928 by the Supreme Court, wherein the Court pointed out that the old basis for assessing and proportioning costs was no longer the law and said:

"The change of circumstances is based primarily upon the revolutionary changes incident to transportation wrought in recent years by the widespread introduction of motor vehicles; the assumption by the Federal Government of the functions of road builder; the resulting depletion of rail revenues; the change in the character, the construction and the use of highways; the change in the occasion for elimination of grade crossings, in the purpose of such elimination, and in the chief beneficiaries thereof; and the change in the relative responsibility of the railroads and vehicles moving on the highways as elements of danger and causes of accidents."

and held:

"The main purpose of grade separation therefore is now the furtherance of uninterrupted, rapid move-

meet by means available in this respect grade separation is a desirable engineering feature comparable to removal of grades and curves, to widening the highway, to strengthening and flushing it, to eliminating dust nuisance, to lighting up grade ends, and to bridging streams. The railroad has ceased to be the prime instrument of danger and the main cause of accidents. It is the railroad which now requires protection from dangers incident to motor transport. [12] Indeed, Prior to the introduction of the Federal-aid system, numerous highways were built under the direction of the municipalities, and paid for out of funds raised locally by taxation or otherwise. They served, in the main, local traffic. The long distance traffic was carried almost wholly by the railroads and the water lines. Under these conditions the occasion for separation of grades was mainly the danger incident to rail operations; and the promotion of safety was then the main purpose of grade separation. Thus, it was reasonable to impose upon the railroad a large part of the cost of eliminating grade crossings, and the imposition was rarely a hardship. For the need for eliminating existing crossings, and the need of new highways free from grade crossings, arose usually from the growth of the community in which the grade separation was made; this growth was mainly the result of the transportation facilities offered through the railroad; the separation of grade crossings was a normal incident of the growth of rail operations; and as the highways were then feeders of rail traffic, the community's growth and every improvement of highway facilities benefited the railroad. The effect upon the railroad of constructing Federal-aid highways, like that here in question, is entirely different. They are not feeders of rail traffic. They deplete the existing rail traffic and the revenues

of the railroads. Separation of grades serves to intensify the motor competition and to further deplete rail traffic. The avoidance thereby made possible of traffic interruptions incident to crossing at grade are now of far greater importance to the highway users than it is to the railroad concerned. For the rail operations are few; those of motor vehicles very numerous."

For those who were studying the effect of the change of economic reasons upon grade separations, the above case was not a surprise. In *Southern R. Co. v. Virginia ex. rel. Shirley* (1923), 260 U.S. 130, 78 L. Ed. 200, the State Highway Commissioner was given statutory authority to order a separation of grades at the expense of the railroad without notice. The court said:

"Certainly, to require abolition of an established grade crossing and the outlay of money necessary to construct an overhead would take the railway's property in a very real sense. This seems plain enough both upon reason and authority. *Washington Ex Rel. Oregon R. & Nav. Co. v. Fairchild*, 224 U.S. 510, 523, 524, 56 L. ed. 863, 868, 32 S.Ct. 535; *Great Northern R. Co. v. Minnesota*, 238 U.S. 340, 345, 59 L. ed. 1337, 1339, 35 S.Ct. 753, P.U.R. 1915 D, 701. See *Chicago, M. & St. P. R. Co. v. Railroad Comrs.* 76 Mont. 305, 247 Pac. 162 [20]

"If we assume that by proper legislation a State may impose upon railways the duty of eliminating grade crossings, when deemed necessary for public safety and convenience, the question here is whether the challenged statute meets the requirements of due process of law. . .

"Counsel submit that the Legislature, without giving notice or opportunity to be heard, by direct order

might have required elimination of the crossing. Consequently, they conclude the same end may be accomplished in any manner which it deems advisable without violating the Federal Constitution. But if we assume that a state legislature may determine what public welfare demands and by direct command requires a railway to act accordingly, it by no means follows that an administrative officer may be empowered, without notice or hearing, to act with finality upon his own opinion and ordain the taking of private property. There is an obvious difference between legislative determination and the finding of an administrative official not supported by evidence. In theory, at least, the legislature acts upon adequate knowledge after full consideration and through members who represent the entire public."

Thus the situation before the Commission is that the Commission must apportion the cost "to the parties benefited". The Commission cannot act arbitrarily. The Commission must also recognize that in the matter of Los Feliz Boulevard there was not great danger in the grade crossing, but the motivating factor was elimination of vehicular delay. Thus the application of the apportionment of benefits to the parties should be consistant with the motivation, or the benefit created by vehicular delay. Further, the elements approved by the case of *San Jose vs. Railroad Commissioners* (1917) 175 Cal. 284, 288-90 do not appear in the Los Feliz case, but the facts as stressed by the *Nashville, etc. v. Walters* (294 U.S. 405, 79 L. Ed. 949, 956, 959-60) are those present in the Los Feliz case, and it is submitted the Commission should follow the doctrine of the Nashville, etc. vs. Walters (supra) case. [21]

XVIII

The Commission Unlawfully and Arbitrarily Apportioned Costs on a 50% Basis

The Commission recognizes that its authority to apportion costs is found in Section 1202 of the Public Utilities Code (Opinion p. 14, lines 2-8). Certain language in that Section should be closely examined. Section 1202 (c) provides:

> "The Commission has the exclusive power: (c) . . . to prescribe the terms upon which such separation shall be made and the proportions in which the expense. . . shall be divided. . . between such (railroad) corporations and the state, county, city, or other political subdivision affected."

Can the Commission arbitrarily apportion the expense? Can the Commission arbitrarily apportion the cost 50% on the railroad and 50% on the municipal corporations? What yardstick shall be used? It is elementary that the Commission cannot act arbitrarily.

The Commission touched on the "benefits" theory as follows:

> "While the railroad contended that the costs should be assessed according to the so-called 'benefits' theory, we affirm our holding in Decision No. 37344, dated June 24, 1952, on Application No. 29396, wherein it was held that the authority of this Commission to allocate costs stems primarily from Section 1202 of the Public Utilities Code and is an exercise of the police power on the part of the State of California through the medium of its agency, the Public Utilities Commission. Therefore we are not bound to follow the so-called 'benefits' theory. . ." (Opinion p. 14, lines 1-9)

and then went on to find in the decision:

> "Therefore, in view of all the evidence in this case and considering the positions of the respective parties hereto, we hereby find that, of the allocable costs. . . Southern Pacific Company should bear 50 per cent . . . the County of Los Angeles 25 per cent . . . and the Cities of Glendale and Los Angeles 12½ per cent each . . ."

Obviously the Commission was using no yardstick. There was nothing in the evidence to support such a finding except a statement about police power. How can the Commission reach such a percentage? [22] The purpose of the proposed separation of Los Feliz Road is not to increase public safety, but to increase the free flow of vehicular traffic on a road of considerable importance leading principally to the many population centers in Southern California (Rep. Tr. p. 20, l. 2, page 23, lines 19-20, page 26, lines 20-22, page 29, page 27, lines 2-3, page 185, l. 12-26, page 19, l. 5-6, page 29).

Since the submission of these matters and the filing of the briefs there was published (under date of May 1, 1952) a very comprehensive and extensive report and publication of the Stanford Research Institute entitled, "The Railway-Highway Grade Crossing Problem—Economic Principles." The purpose behind this careful analysis and excellent report is stated in the Preface as follows:

> "The grade crossing problem is of major importance to the railroads, motor vehicle users, and the general public. In many instances, all of these groups are required to participate in the cost of grade crossing improvements and separations. A question often arises as to the relative financial responsibility of each group for specific improvements.

"The Stanford Research Institute recognized in late 1950 that this problem required some organized research effort in order to permit development of a sound public policy by agencies concerned with grade crossing improvements and eliminations. Throughout 1951 and early 1952, the Institute engaged in a study of the problem with particular reference to the California situation. The results of this study are being made available in this report. It is being released as a part of the Institute's continuing program of public service research.

"This report deals with economic aspects of the grade crossing problem. It makes no attempt to cover the many political and sociological problems involved in highway projects generally and in grade crossing projects particularly. The overall objective of the report is to set forth sound economic principles applicable to the grade crossing problem. Often adequate data are not available upon which to base factual conclusions. In such cases, the report presents the economic reasoning supporting the conclusions as stated . . ."

". . . The Stanford Research Institute hopes that this report will be of some assistance to the transportation industry, government agencies, and the public in their consideration of the grade crossing problem." (Page iii) [23]

It appears in the matters involved in the present decision which is in the nature of a test case and a change of policy of the Commission that every available source of information and study should have been before the Commission. The exhaustive report of Stanford Research Institute is a tremendous work of gathering important source material upon this current problem. The report is much too long and

comprehensive to quote, but extracts are given hereafter to show the complicity of the problem and the suggested solution based on rationalization and stable methods of approach.

The Stanford Research Institute in its report of May 1, 1952 entitled "The Railway-Highway Grade Crossing Problem" states in Part 2 relating to "Approaches to Evaluating Grade Crossing Projects" under Section IV the following conclusions:

ALLOCATING COSTS FOR GRADE CROSSING PROJECTS

"Conclusions

1. All grade crossing improvements and eliminations provide joint services or products for motor vehicle users, the railroads, and the general public.

2. The costs of grade crossing improvements and eliminations are joint costs.

3. When products or services are produced jointly, their costs are joint and cannot be allocated directly to each product. In such cases, joint costs can only be distributed in accordance with the relative demand for the products or services.

4. The relative demands of the several beneficiaries for the services of grade crossing improvements and eliminations should determine the distribution of the total (joint) [24] costs of the projects among the beneficiary groups.

5. The relative demands of the beneficiary groups should be measured by the relative value of benefits each receives from the grade crossing projects.

6. There is no essential difference in sound principles of cost allocation between (a) grade crossing

improvements, (b) separations, and (c) opening and closing of crossings.

7. Any distribution of costs based upon whether the highway or railway was first located at the crossing is not economically sound.

8. Almost all states have statutes either fixing the distribution of costs for crossing projects or vesting the power to do so in a public body.

9. Two significant tendencies have developed over recent years in distribution of the costs for grade crossing projects. First, the percentage of total costs assigned to railroads has declined. Second, state laws are providing increasingly for distribution of costs on the basis of benefits received.

10. The United States Supreme Court has formally recognized the validity of distributing costs for grade crossing projects among beneficiary groups on the basis of relative benefits received.

11. The policy of distributing costs for projects undertaken with Federal-aid funds by assigning arbitrary values of benefits to the railroads [25] and to the general public is economically unsound.

12. Prior to 1933, the California Public Utilities Commission assigned costs for projects to the railroads and the public generally on a fifty-fifty basis. Subsequently, the Commission adopted the benefit basis for cost distribution on crossing projects.

13. In 1949, the California Public Utilities Commission gave evidence of reverting to its earlier unsound fixed-percentage basis of cost assignment on grade crossing projects. The particular case reflecting the change in Commission policy was presented for a rehearing, and no decision on the rehearing has yet been rendered by the Commission." (Page 44)

The report of the Stanford Research Institute then points out:

FIXED-PERCENTAGE BASIS NOT SOUND

"A policy of assigning costs for a grade crossing improvement to railroads (or to other beneficiary groups) on the basis of a fixed percentage of total costs is no more realistic or economically sound than is an assumption that the economic nature and character of the grade crossing area, crossing usage, and highway development and usage may be identical as between grade crossings. Economic variations relating to various grade crossings are so great that a fixed-percentage basis of cost allocation cannot be economically sound." (Page 47) [26]

The report of the Stanford Research Institute then went on to observe that:

THE SUPREME COURT ON COST DISTRIBUTION

"Legal responsibility of the railroads for assuming costs on grade crossing projects was defined by the Supreme Court in a 1914 ruling based, of course, upon economic conditions in existence at the time.

> "It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings, but also to build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their tracks, or to carry their tracks over such highways . . .[9]

[9] *Chicago, M. St. P. R. Co. vs. Minneapolis* (1914) 232 U.S. 437, 58 L. Ed. 674.

In another 1914 case, the same court said:

> "That a railway company may be required by the state, or by a duly authorized municipality acting under its authority, to construct overhead crossings or viaducts at its own expense, and that the consequent cost to the company as a matter of law is . . . deemed to be compensated by the public benefit which the company is supposed to share, is well settled by prior adjudications of this court . . . (citing cases).[10]

"Under these decisions it may be inferred that there is no legal limit to the portion of the total costs for grade crossing improvements and eliminations which may be assigned by public bodies to the railroads. These cases were, however, predicated upon a different set [27] of economic facts than exists today. The requirement for grade crossing improvements in 1914 was a requirement for increased public safety, and not basically a demand for increased free flow of traffic at crossings as is the case today.

"Freund has made the following observation:

> "It is an elementary principle of equal justice that where the public welfare requires something to be given or done, the burden be imposed or distributed upon some rational basis, and that no individual be singled out to make a sacrifice for the community. The principle lies at the foundation of the law of taxation, and applies equally to the police power. With reference to the latter it may be expressed by saying that to justify the imposition of a burden there must be some connection of causation or responsibility between the person selected or the right impaired and the

[10] *Missouri Pacific R. Co. v. Omaha* (1914), 234 U.S. 127, 59 L. Ed. 160.

danger to the public welfare or the public burden which is sought to be avoided or relieved.[11]

"The Supreme Court, while recognizing the regulation of grade crossings as a legitimate exercise of the police power of the states, has indicated that this power is subject to a constitutional limit and that it may not be exerted arbitrarily or unreasonably. The court, in a 1935 case involving allocation of costs of a grade crossing elimination, took into full account the change in economic conditions since its earlier decisions. It also recognized the necessity for [28] justifying a burden on the railroads for such costs. The Court said:

"The railroad has ceased to be the prime instrument of danger and the main cause of accident. It is the railroad which now requires protection from dangers incident to motor transportation. Prior to the establishment of the Federal aid system . . . highways . . . served, in the main, local traffic. The long distance traffic was served almost wholly by the railroads and the water lines. Under those conditions the occasion for separation of grades was mainly the danger incident to rail operations; and the promotion of safety was then the main purpose of grade separation. Then it was reasonable to impose crossings; and the imposition was rarely a hardship . . . The need for eliminating existing crossings and the need of new highways free from grade crossings arose usually from the growth of the community in which the grade separation was made; this growth was mainly the result of the transportation facilities offered through the railroad; the separation of grade crossings was a normal incident to the growth of

[11]Ernst Freund, The Police Power, p. 635.

> rail operations; and as the highways were then feeders of rail traffic, the community's growth and every improvement of highway facilities benefited the railroad. The effect upon the railroad of constructing . . . (modern) highways . . . is entirely different. They are not feeders of rail traffic. They deplete the existing rail traffic and the revenues of the railroads . . . The avoidance . . . (by grade separation) of traffic interruptions incident to crossing at grade are now of far greater importance to the highway users than it is to the railroad crossed, for the rail operations are few, those of motor vehicles very numerous.[12]

"This position by the Supreme Court indicates the legal as well as economic necessity for taking into account the reasons for grade crossing improvement and elimination projects, and for considering relative benefits, in distribution of [29] costs for grade crossing projects." (Page 48-9)

It was further pointed out in the Stanford Research Institute Report the following under the Section heading of:

ACCIDENTS AS A BASIS FOR JUSTIFICATION OF GRADE CROSSING PROJECTS

"Conclusions

1. Public safety remains the publicized basis of demand for railway-highway grade crossing improvements or eliminations, although the principal basis is actually the demand for greater conveniences in highway travel.

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[12] *Nashville, C. St. L. R. Co. vs. Walters* (1935), 294 U.S. 405, 79 L. Ed. 949.

2. If only public safety were involved, adequate protection (except against careless drivers) could be obtained in most instances at less cost by installing highly effective protective devices than by constructing separations.

3. Grade crossing accidents in the United States have decreased slightly since 1934 even though there has been an increase in the number and use of motor vehicles on the highways. There has been a marked tendency toward relative improvement in the hazard situation.

4. Grade crossing accidents in the nation as a whole are not overly significant when compared with total highway accidents. Grade crossing accidents in California have in recent years declined in significance relative to total highway accidents. [30]

5. Most highway accidents result basically from increased highway travel, inadequate highway capacity, and lack of caution by motor vehicle drivers.

6. The reduction of highway accidents involves three approaches; (a) additional safety provisions in vehicle construction, (b) regulation of highway uses and education of users, and (c) design and construction of highways to provide additional built-in safety.

7. Motor vehicle users have a right to receive and public bodies a duty to provide adequate protection and warning devices at railway-highway grade crossings. If these warning and protective devices are provided but ignored, motor vehicle users should bear the economic responsibility for accidents." (Page 16)

When the Commission, in view of the record and the evidence that the primary purpose of the proposed separation was to eliminate delay to vehicles, proceeded to apportion the cost at 50% to the railroad, the Commission acted

arbitrarily, without authority of law and violated the due process clause. Mr. Justice Brandeis in the case of *Nashville C. & St. L. R. Co. vs. Walters* (1935) 294 U.S. 405, 79 L. Ed. 949, carefully pointed out:

> "The promotion of public convenience will not justify requiring of a railroad, any more than of others, the expenditure of money, unless it can be shown that a duty to provide the particular convenience upon it . . ."

and then stated the railroad had no duty to provide separations where the main purpose of grade separation was to further uninter- [31] rupted rapid movement by vehicle rather than the promotion of safety.

The Commission in reverting to a 50 per cent formula is shutting its eyes to modern economic trends and the obvious directions of the Supreme Court of the United States. It is a backward rather than a forward step.

The Commission has failed to pursue its authority regularly or at all so far as proportioning costs between the parties is concerned, has acted beyond the scope of its authority, and its requirement in the circumstances amounts to confiscation in violation of the due process and other clauses of the Constitution of the United States and of the State of California.

In addition the Commission in apportioning costs on a 50% basis has acted so arbitrarily and unreasonably as to deprive Southern Pacific Company of its property without due process of law, in violation of the 14th Amendment to the Federal Constitution and Article I, Section 13 and 14 of the California Constitution. (*Nashville, C. St. L. R. Co.*

ex. Walters, 294 U.S. 405, 79 L. Ed. 949; *Southern R. Co. vs. Virginia*, 290 U.S. 190, 78 L. Ed. 260).

Such action also amounts to an undue burden on interstate commerce in violation of the commerce clause of the Federal Constitution, and violates the policy in favor of economical railroad operation, set forth as the National Transportation Policy (54 Stat. L. 899). [32]

XIX

The Commission's Order Failed to Consider the Evidence Relating to the Steel and Copper Restrictions with the Result the Order Requires Impossibilities.

The Commission, by its decision and order, has acted without evidence in ordering, in paragraph 7 of the order (page 17) that the grade separation be commenced within one year and completed within two years after the date of the Commission's order, (and which later date is an arbitrary date not the date the order becomes effective). There is nothing in the record to indicate that steel and copper will be available within one year or two years from the date of the order. Further, there is nothing in the record to indicate that the structure can be completed within two years after the date of the Commission's order. The Commission made no finding of fact and no finding of ultimate fact on the subject. Thus the Commission, in purporting to impose a time limit for, first, the commencement of the construction, and, second, for the completion of the construction of the grade crossing, has acted without supporting evidence, and has thus failed to pursue its authority regularly or at all. In fact, the evidence is directly to the contrary.

The Opinion at page 10, lines 26-28, summarizes the testimony of the Assistant to the Chief Engineer of the Southern Pacific Company as follows:

> "It was his testimony that the possibility of securing steel and other necessary metals and cement for the project was very uncertain."

The testimony given on November 1, 1951, is found at Rep. Tr. page 272, line 26, to page 273, line 11, as follows:

> "In my opinion, the situation is now so nebulous that I would hesitate to make a recommendation that it could even be started within a three-year period, assuming, of course, that the defense program is continued at either the [33] same rate, and particularly if it is accellerated.
>
> "Commissioner Huls: Pardon me. If the critical situation were relieved, let's say, within the next six months, so that normal steel demands were met in normal delivery times, would your opinion be the same? A. Of course, if we get back to a normal period, my opinion, I would fix it a year shorter, a two-year period rather than a three-year period."

and at Rep. Tr. p. 309, l. 4-10, the following testimony was given on November 29, 1951:

> "Mr. Lauten: Mr. Paul, in your direct testimony you stated that you had recently talked with the Bureau of Public Roads about grade separation projects, and I believe you stated that they felt unless the project is something that is absolutely vital to defense work, it should not be undertaken at this time. Was that correct?
>
> "A. That is correct."

Since the above testimony was given on November 1 and 29, 1951, we have not returned to a normal period. In fact, the steel industry is in the grips of a long strike. What the future holds is not known. It is submitted that the Commission has exceeded its jurisdiction and will require an impossibility when it required in paragraph 7 of the order (page 17) that the parties commence construction within one year and complete the construction within two years. The addition to the order of the words "unless further time is granted by subsequent order" means nothing in view of the Commission's failure to follow the above quoted uncontradicted evidence upon the subject.

Southern Pacific Company believes that the Commission has purported to require an impossibility; yet if the decision is allowed [34] to stand Southern Pacific Company might be subject to penalties for failure to do the impossible. Thus, the Commission, in purporting to impose a time limit for the commencement and completion of the grade separation, has acted without supporting evidence and has thus failed to pursue its authority regularly or at all.

Reference is also made to Paragraph VII-B of the Southern Pacific Company's Brief (page 31) for a further discussion of this subject. [35]

XX

The Commission's Order Violates Statutory Provisions and the Commission's Order Is Void

The Public Utilities Code (and Public Utilities Act of 1951) provides under the Chapter Heading of "Hearings and Judicial Review" in Section 1705, as follows:

"* * * After the conclusion of the hearing, the Commission shall make and file its order containing its decision. A copy of such order, certified under the seal of the Commission, shall be served upon the corporation or person complained of, or his or its attorney. *The order shall,* of its own force, take effect and *become operative 20 days after the service thereof, except as otherwise provided.* * * *.*"

The order in Decision No. 47420 provides:

"The effective date of this order shall be twenty (20) days after the date hereof."

The decision and order were not served personally but by mail. The decision and order is dated June 30, 1952, but was not received in the mail by the attorney of Southern Pacific Company until July 3, 1952. This delay in service is of tremendous importance when an application for a rehearing is being prepared under the provisions of Section 1733 of the Public Utilities Code when it is desired to file an application for rehearing 10 days or more before the time the order takes effect.

The Statute presents two problems. The *first* is the meaning of the words "except as otherwise provided". It is submitted this means as otherwise provided by statute. The 20 days after service is a minimum time, and a right given the parties, unless the statute otherwise provides. The statute does provide for additional time in the last sentence of Section 1705, where the statute provides:

"If the Commission believes that an order cannot be complied with within 20 days, it may prescribe such additional time as in its judgment is reasonably necessary to comply with the order, * * *."

Nowhere is the Commission given the right, by Statute, to shorten the 20 day period. [36]

The *second* problem is what is the meaning of "20 days after thet service thereof". (Section 1704 Public Utilities Act) The Commission in this matter, as in all matters, usually serves the corporation or person, or his or its attorney, a certified copy of the order by mailing the same (Rule No. 73, Case No. 4942, Decision Nos. 43994 and 47081 and Section 1705 of the Public Utilities Code). Is the service made at the time of mailing, or upon the receipt of the order?

The general rule regarding service by mail is well stated in 66 Corp. Jur. Sec. 662, as follows:

> "Generally, in the absence of statute providing otherwise, personal service cannot be made by mail.",

and, at 66 Corp. Jur. Sec. 663 as follows:

> "In the absence of custom, statute, estoppel, or express contract stipulation, when a notice, affecting a right, is sought to be served by mail, *the service is not effected until the notice comes into the hands of the one to be served*, and he acquires knowledge of its contents, * * *".

The Commission's attention is directed to Section 1704 of the Public Utilities Code, which provides in part as follows:

> "*Service* in all hearing, investigations, and proceedings pending before the Commission *may be made upon any person* upon whom a summons may be served *in accordance with the provisions of the Code of Civil Procedure*, and *may be made* personally or *by mailing*

It is believed the above language is applicable and it is submitted that the above language gives the Commission the right to serve by mail in all hearings, investigations, and proceedings in accordance with the provisions of the Code of Civil Procedure. Sections 1012, 1013, and 1963 (24) of the Code of Civil Procedure are the applicable sections. Section 1013 provides as follows:

> "§1013. Method of Service.—In case of service by mail, the notice or other paper must be deposited in the United States Post office, or a mail box, sub-post office, sub-station or mail chute, or other like facility regularly maintained by the Government of the United States, in a sealed envelope, with postage paid, addressed to the person on whom it is to be served, at his office address as last given by [37] him on any document which he has filed in the cause and served on the party making service by mail; otherwise at his place of residence. The service is complete at the time of the deposit, but if, within a given number of days after such service, a right may be exercised, or an act is to be done by the adverse party, the time within which such right may be exercised or act be done, is extended one day, together with one day additional for every full one hundred miles distance between the place of deposit and the place of address, if served by different post offices, but such extension shall not exceed thirty days in all."

Section 1013 of the Code of Civil Procedure is specific in providing that when service is resorted to by mailing, the time within which a right is to be exercised is extended by adding one day for mailing, and one day for each full one hundred miles the mail travels. This statute and construction of the language of the statute was approved and

held valid in Department of Social Welfare vs. Gandy (1942) 56 Cal. App. (2d) 209, 215.

The above situation should be compared to the Administrative Procedure Act (not applicable to the Public Utilities Commission) where in Section 11519 of the Government Code it is provided:

> "The decision shall become effective 30 days after it is delivered or mailed to the respondent."

This very difference in language in the Administrative Procedure Act as compared to the Public Utilities Code is significant, and the courts will hold that when statutes differ, the legislature meant the difference (See also 2 Cal. Jur. (2d) 274).

The Commission has adopted its Rule 74 (Case No. 4924 Decision Nos. 43994 and 47081) directly contrary to the statute. A portion of the Commission's Rule 74 is as follows:

> "Decisions and orders in complaint or investigation proceedings shall become effective twenty days after service thereof, *unless otherwise provided therein.*" (Italics added)

The use of the word "therein" is an attempt by the Commission to change the statute (Public Utilities Code Section 1705) by Rule. [38] The Commission is attempting by rule to cut down the 20 day period provided for in Section 1705 of the Public Utilities Code which includes additional days in the case of mailing, as provided for in Section 1704 of the Public Utilities Code. No commission, by rule, can change a Statute, unless the Statute so provides. The Statute has not so provided. Thus mailing of the certified copy

of the order allows a party under Section 1733 of the Public Utilities Code one additional day for mailing and one additional day for each full 100 miles. As applied to the facts in the present case, where Randolph Karr, attorney for Southern Pacific Company, at 670 Pacific Electric Building, Los Angeles 14, California was served with the certified copy of the order by mail, five addifional days plus the twenty days provided by Section 1705 of the Public Utilities Code are necessary to elapse before the order can be effective. As said in Section 1705 of the Public Utilities Code:

> "The order shall, of its own force take effect and become operative *20 days after the service thereof.*"

Thus service by mail extended the time of Southern Pacific Company to act under Section 1733 of the Public Utilities Act and additional 5 days, with the result the 20 day period will be extended to July 25, 1952. Yet the order of the Commission has not followed the statutory language that the order is to take effect 20 days after service, but has recited the order is effective 20 days after the date of the order, or July 20, 1952. Such language is void. This is particularly important in computing the time to apply for a rehearing, as well as the 10 or more days before the effective date of the order (Section 1733 of the Public Utilities Code). The Commission is attempting to make the effective date of the order earlier than the effective date under the Statute. If through neglect or delay, or even excusable acts, the Commission did not mail the certified copy of the order to the parties for several days, the Commission by its own act could take [39] away the right of a party to set aside

the order given him under Section 1733 of the Public Utilities Code. It is submitted the language in the order:

> "The effective date of this order shall be twenty (20) days after the date hereof"

is void, without authority of law or statute, and in violation of Section 1704 and 1733 of the Public Utilities Code.

Time is of particular importance in a test case such as this matter in connection with properly preparing of applications for rehearing. In the companion case to this matter, decided on June 24, 1952, in Application 29369, Decision No. 47344, the so-called Washington Boulevard Separation of the Santa Fe in the City of Los Angeles, the language in the order was as follows:

> "The effective date of this order shall be sixty (60) days after the date hereof,"

while in this case of the same importance and involving similar problems but more money the Commission attempted to make its order effective in 20 days after the date of the order (and contrary to Statute since no order can be effective until 20 days after service of a certified copy of the order).

In Paragraph 3 of the order in this matter (page 16) it is provided the City of Glendale shall do certain things within 120 days from the date of the order rather than from the time the order is effective. The whole scheme of the order in basing the time element upon the date of the order (when the order is not effective, and will not become effective until after service) rather than on when the order becomes effective, renders the order void not only for uncertainty, but as a matter of law.

Section 2101-2113 of the Public Utilities Code provides that failure to comply with the orders of the Public Utilities Commission is a crime, and Section 2108 of the Public Utilities Code provides that in the case of a continuing violation each day's continuance shall be a separate and distinct offense. When does [40] the violation commence? The Commission's order provides the crime commences 20 days after the date of the order irrespective of whether the order has been served as to one, all, any, or none of the parties. Such an order has been held void by our courts. The fact the courts can determine whether the particular person has come within the terms of the Statute, that is, whether service has been made or not—will not validate a statute where it cannot be determined from the statute itself whether or not the defendants' acts are illegal. (In Re Bell (1942) 19 Cal. (2) 488, 496, 122 Pac. (2) 22; In Re Pepers (1922) 189 Cal. 682, 688, 209 Pac. (2) 896.) Thus the failure of the order to follow the Statute renders the order void. One must be able to determine from the order itself whether the order is valid, and here the Commission has provided for an effective date that not only does not follow the Statute, but is contrary to the Statute, since the statute provides that the order is not effective until 20 days after service of a certified copy of the order. [41]

It is respectfully submitted, therefore, that a rehearing be granted in the above-entitled proceedings, and that said Decision No. 47240 be set aside and annulled.

Dated at Los Angeles, California, July 9, 1952.

SOUTHERN PACIFIC COMPANY

By B. W. MITCHELL
Superintendent

E. J. FOULDS
65 Market Street
San Francisco, California.

RANDOLPH KARR
670 Pacific Electric Building
Los Angeles 14, California

By RANDOLPH KARR
Randolph Karr
Attorneys for
Southern Pacific Company [42]

Exhibit E

Decision No. 47597

Before the Public Utilities Commission of the State of California

In the Matter of the Application of the CITY OF GLENDALE, a municipal corporation, for an order or orders authorizing and requiring the construction of a grade separation of the crossing of Los Feliz Road and the railroad of the SOUTHERN PACIFIC COMPANY, designating the portions of the work to be done respectively by said City, THE CITY OF LOS ANGELES and said railroad corporation, and allocating the cost thereof among said Cities and said railroad corporation.	Application No. 32385
In the Matter of the Investigation on the Commission's own motion as to the necessity of effecting a grade separation between the tracks of the Southern Pacific Company and Los Feliz Boulevard in the cities of Los Angeles and Glendale, County of Los Angeles, State of California, and the division among the affected parties of the cost incident to such separation.	Case No. 5327

ORDER DENYING REHEARING AND MODIFYING DECISION

Southern Pacific Company having filed its petition for rehearing respecting Decision No. 47420, rendered herein,

the Commission having considered said petition and being of the opinion that no cause has been shown for granting the same,

IT IS ORDERED that said petition for rehearing be and the same is hereby denied.

Decision No. 47420 is hereby modified by substituting "spur track" for "yard track" on line 11 at page 2, thereof, and by substituting "$746,600" for "$746,000" on line 26 at page 15 of said deci- [1] sion.

Dated, San Francisco, California, this 19th day of August, 1952.

R. E. MITTELSTAEDT
President

JUSTUS F. CRAEMER
HAROLD P. HULS
PETER E. MITCHELL
Commissioners

Commissioner Kenneth Potter, being necessarily absent, did not participate in the disposition of this proceeding. [2]

Exhibit F

Application No. 32385
Exhibit No. 2
Witness.....
Date.....
Commissioner.....

Public Utilities Commission
State of California
Transportation Department

RESULTS OF AN ENGINEERING STUDY RELATIVE TO EFFECTING A GRADE SEPARATION BETWEEN SOUTHERN PACIFIC CO'S TRACKS

AND

LOS FELIZ BOULEVARD
CITIES OF LOS ANGELES AND GLENDALE

Application No. 32385

San Francisco, California
Sept. 15, 1951

PART V

Economic Justification for the Separation

The Los Feliz Boulevard grade crossing is now protected by manually operated crossing gates over the entire 24-hour period. The accident record during the period January 1, 1926 to March 31, 1951 is shown on an accompanying table, there being a total of 14 collisions between trains and automobiles at this crossing in the last 25 years resulting in one death and nine injuries.

Approximately 27,000 vehicles pass over this intersection in a 24-hour period and the gates are lowered about 70 times a day. Checks indicated the longest delay was approximately 8½ minutes; the total vehicular delay for a 24-hour weekday amounted to approximately 4,500 vehicle minutes, or 75 vehicle hours.

It is not possible to determine with any fine degree of accuracy the public benefits that might accrue from a grade separation at this location. However, certain items do lend themselves to assigned monetary evaluation and these are listed below on an annual basis.

Vehicular delay	$57,362	
Railroad operation cost, gatemen, maintenance, etc.	14,053	
Accident damages paid by railroad	475	
		$71,890
Depreciation on railroad portion of structure	6,991	
Maintenance on same (Excluding track)	1,620	
		8,611
Net annual savings		$63,279
Above savings capitalized at 3%		$2,109,000
Above savings capitalized at 4%		1,582,000
Above savings capitalized at 5%		1,266,000

No allowance has been made for:

(a) Depreciation on retaining walls; wing walls, or for maintenance on the slopes.

(b) The loss of life or injuries to persons resulting from accidents at this crossing. Such casualties do however result in a real economic loss to the community as well as cause pain and suffering to the persons involved and to their families. These are intangible items which do not lend themselves to an accurate appraisal in dollars.

(c) Income tax on any potential savings.

The hourly economic loss due to vehicular delay has been estimated at $2.00 for automobiles, $5.30 for trucks, and $13.50 per hour for buses.

The figure for the automobile consists of 2¢ per minute for delay time, which is the value used by the California Division of Highways, plus one cent per minute representing the cost of idling the automobile, as developed by the Institute of Transportation and Traffic Engineering at the University of California. This has been arbitrarily raised to $2.00 per hour to include some panel trucks which were counted along with the automobiles.

The $5.30 per hour for trucks represents the weighted average of operating costs of trucks of various sizes, developed by the engineers of the Commission in recent rate proceedings. The quoted value of bus delay includes an allowance for the delay to the passengers on board the buses at the Los Feliz crossing.

Further data covering the traffic counts, the development of the annual delay, and the accident record are included on the following pages.

We are indebted to Mr. J. C. Albers, City Engineer of Glendale, and his staff for the traffic counts and delay figures. [29]

ACCIDENT STATISTICS
LOS FELIZ BOULEVARD AND SOUTHERN PACIFIC TRACKS
GLENDALE, CALIFORNIA
TRAIN-AUTOMOBILE COLLISIONS

Year	Number	Killed	Injured	Year	Number	Killed	Injured
1926	1	—	—	1939	1	1	—
1927	—	—	—	1940	—	—	—
1928	—	—	—	1941	—	—	—
1929	—	—	—	1942	1	—	1
1930	1	—	2	1943	1	—	1
1931	—	—	—	1944	1	—	—
1932	1	—	1	1945	—	—	—
1933	—	—	—	1946	1	—	—
1934	—	—	—	1947	—	—	—
1935	—	—	—	1948	4	—	4
1936	—	—	—	1949	1	—	—
1937	—	—	—	1950	—	—	—
1938	—	—	—	1951*	1	—	—
*—3 Months					14	1	9
Average per year					0.55	0.04	0.37

Property Damage (25.25 Years)

	Railroad	Vehicle	Total
Gates and Miscellaneous Accidents	$2,931	$ 221	$3,152
Train-Auto Collisions	34	2,360	2,394
	$2,965	$2,581	$5,546
Average per Year	$ 117	$ 102	$ 219

The 9 persons injured were disabled for a total of 148 days, or 5.85 days per year. [30]

TOTAL VEHICULAR DELAY TIME
LOS FELIZ BOULEVARD AND SOUTHERN PACIFIC TRACKS
GLENDALE, CALIFORNIA

	Autos and Panel Trucks	Other Trucks	Buses	Total Delay Time	
Sunday 6-17-51	4,213	9	9	4,231	Vehicle Minutes
Sunday 6-17-51	70.22	.15	.15	70.52	Vehicle Hours
Monday 6-18-51	3,346	125	42	3,513	Vehicle Minutes
Wednesday 6-20-51	5,299	146	21	5,466	Vehicle Minutes
Total (2 Weekdays)	8,645	271	61	8,979	Vehicle Minutes
Average Weekday	4,323	135	32	4,490	Vehicle Minutes
Average Weekday	72.05	2.25	.53	74.83	Vehicle Hours
Annual Delay					
254 Weekdays	18,300	572	135	19,007	Vehicle Hours
111 Sat. Sun. & Hol.	7,794	17	17	7,828	Vehicle Hours
365	26,094	589	152	26,835	Vehicle Hours
Cost per hour	$2.00	$5.30	$13.50	—	
Annual delay Cost	$52,188	$3,122	$2,052	$57,362	

[31]

VEHICLE VOLUME COUNTS
LOS FELIZ BOULEVARD AND SOUTHERN PACIFIC TRACKS
GLENDALE, CALIFORNIA

Item	Sun. 1-8-50	Sun. 6-17-51	Thur. 12-22-49	Mon. 6-18-51	Wed. 6-20-51
Vehicle Count—24-Hour Period					
Automobiles and Light Panel Trucks	—	27,138	—	24,642	25,331
Tank Trucks	—	1	—	18	26
Trailer Trucks	—	7	—	119	106
Other Trucks	—	105	—	917	1,024
Buses	—	99	—	188	198
Motorcycles	—	75	—	102	118
Total Vehicles	70,807	27,425	26,675	25,946	26,803
Pedestrians	—	351	—	486	594
Total Vehicles					
Peak 15-minutes	393	569	608	657	581
Peak hour	1,399	2,044	2,271	2,329	2,188
Number of times gates were lowered	—	59	—	71	69
Maximum number of times in one hour	—	6	—	9	7
Longest delay	—	8' 6"	—	6' 3"	8' 30"

Exhibit G

"LIST OF GRADE SEPARATIONS CONSTRUCTED IN CALIFORNIA, 1934-1950, INVOLVING SOUTHERN PACIFIC LINES, SHOWING APPORTIONMENT OF COSTS AND BASIS THEREOF"

Sheet 1

Location	Year Built	Over or Under	PUC Order No.	Date of Order	Audit No.	BASIS OF PUC ORDER			APPROXIMATE COST				
						Agreement Between Parties	PUC Decision	On Benefits	% SP Co.	% Others	$ SP Co.	$ Others	$ Total
WESTERN DIVISION													
Cordelia (Original)	1937	UP	26353	9-25-33	35270	X			0	100			100,000
Cordelia (Widening)	1950	UP				X			0	100			140,000
San Leandro Creek (East Shore Freeway)	Under Const.	OH	38893	4-23-46	72604	X			0	100			240,000
19th Ave. Oakland (East Shore Freeway)	1949	OH	40511	7- 8-47	76058	X		X	10% SP & WP	90	16,500 SP 5,500 WP	198,000	220,000
High St., Oakland (East Shore Freeway)	1950	OH	41964	8-17-48	78998	X			0	100			320,000
42nd Ave., Oakland (East Shore Freeway)	1950	UP	41964	8-17-48	78998	X			0	100			480,000
5th St., Oakland (East Shore Freeway)	1948	OH	39199	7- 9-46	74487	X			0	100			1,110,000
Fruitvale Ave., Oakland (East Shore Freeway)	1950	OH	38271	10- 2-45	70548	X			0	100			265,000
McConnell	1934	UP	25889	5- 1-33	34754		X				15,000	Balance	80,000
Maritime St., Oakland	1942	OH	34958	1-27-42	54627	X			0	100			200,000
Bay Bridge Approach, Oakland (Crossing A-6.38-A)	1936	OH	27773	2-25-35	37740	X			0	100			125,000
Bay Bridge Approach, Oakland (Crossing A-6.42-A)	1936	OH	27773	2-25-35	37740	X			0	100			125,000
										Subtotal	27,000		3,405,000

Location	Year Built	Over or Under	PUC Order No.	Date of Order	Audit No.	BASIS OF PUC ORDER: Agreement Between Parties	PUC Decision	On Benefits	APPROXIMATE COST: % SP Co.	% Others	$ SP Co.	$ Others	$ Total
Ashby Ave., Berkeley	1935	UP	27371	9-17-34	37067	X			0	100			165,000
University Ave., Berkeley	1939	OH	31706	1-30-39	47838	X			0	100			190,000
Albany	1936	OH	28286	10-17-35	47081	X			0	100			200,000
Davis	1941	UP	22969	4- 2-40	49824	X			0	100			200,000
Nichols Road, Nichols	1948	OH	41046	12-17-47	77341	X			100				12,000
Turlock	1940	OH	31385	10-24-38	46347	X			0	100			185,000
Livingston	1939	UP	30246	10-18-37	45142	X			0	100			135,000
Adeline St., Oakland	1942	OH	34765	11-18-41	54627	X			0	100			100,000
Niles	1937	UP	28722	4-13-36	40177	X			0	100			130,000
Altamont (D-52.0-A)	1938	OH	30104	9- 7-37	43469	X			0	100			85,000
Altamont (D-58.0-A)	1938	OH	30102	9- 7-37	43426	X			0	100			90,000
Tracy	1936	OH	28324	11- 4-35	39099	X			0	100			175,000
Stockton	1937	UP	28326	11- 4-35	39082	X			0	100			250,000
First St., Niles	1938	UP	28722	4-13-36	40177	X			0	100			80,000
Hwy, Niles	1938	UP	28722			X			0	100			110,000
												Subtotal	2,107,000

Ford Ranch Road, Niles-Shinn	1937	UP	28722	4-13-36	40177	X			0	100			45,000
Niles-Shinn (DAB-42.4-BC)	1937	UP	28722			X			0	100			45,000
105th Ave. & San Leandro St.	1937	UP	28786	5- 4-36	40316	X			0	100			100,000
Agnew	1936	UP	27927	4-29-35	38093	X			0	100			100,000
Napa	1949	OH	41329	3-16-48	77888	X			0	100			100,000
SACRAMENTO DIVISION													
Andora (Reconstruction)	1949	UP	No Order Issued						0	100			5,000
12th St., Sacramento (Reconstruction)	1950	UP	41189	4- 3-48	77533	X			0	100			890,000
Washington St., Roseville	1950	UP	41198	2-10-48	83357	X		X	10	100	128,477	1,156,289	1,284,766
North Auburn	1948	UP	39392	9-10-46	74028	X			0	100			100,000
East Auburn	1947	OH	37507	12-28-44	67105	X			0	100			120,000
White Rock	1949	OH	41428	4- 6-48	78013	X			0	100			90,000
												Subtotal	2,889,766

Location	Year Built	Over or Under	PUC Order No.	Date of Order	Audit No.	BASIS OF PUC ORDER: Agreement Between Parties	PUC Decision	On Benefits	APPROXIMATE COST: % SP Co.	% Others	$ SP Co.	$ Others	$ Total
Swanston	1945	UP	37511	11-28-44	67104	X			0	100			
"I" St., Sacramento (Reconstruction)	1938	OH	28976	7- 9-36	40793	X			0	100			40,000
16th St., Sacramento (Widening)	1936	UP	No Order Issued						0	100			200,000
Foothill	1946	UP	39392	9-10-46	74028	X			0	100			60,000
Colfax	1938	OH	31045	6-27-38	45579	X			0	100			100,000
Yuba City	1946	OH	38495	12-10-45	71102	X			50	50	35,882	35,882	71,764
Bowman (EB Track)	1949	OH	42661	3-29-49	80978	X			0	100			90,000
Bowman (WB Track)	1949	OH	42661	3-29-49	80978	X			0	100			90,000
												Subtotal	651,764

SHASTA DIVISION

Bailey Hill (Hornbrooke-Hilt)	1948	UP	39394	9-10-46	74029	X			0	100			110,000
Black Butte	1949	OH	37560	12-19-44	81092	X			0	100			200,000
Red Bluff (Replacement)	1936	UP	28417	12- 2-35	41128	X			0	100			140,000
Redding	1939	UP	30244	10-18-37	43749	X			0	100			110,000
Weed	1940	OH	32558	11-14-39	49168	X			0	100			90,000

COAST DIVISION

South San Francisco (Bay Shore Freeway)	1949	OH	38966	5-14-46	72881	X			0	100			1,230,000
Sanborn Rd., Spreckels Jct.	1948	OH	39395	9-10-46	73713	X			0	100			245,000
Waldorf	1949	OH	41269	3- 2-48	77711	X			0	100			95,000
North Aptos	1948	UP	40571	7-29-47	76158	X			0	100			140,000
South Aptos	1948	UP	40572	7-29-47	76159	X			0	100			130,000
												Subtotal	2,490,000

Location	Year Built	Over or Under	PUC Order No.	Date of Order	Audit No.	BASIS OF PUC ORDER: Agreement Between Parties	PUC Decision	On Benefits	APPROXIMATE COST: % SP Co.	% Others	$ SP Co.	$ Others	$ Total
Soledad	1936	UP	28373	11-18-35	39165	X			0	100			140,000
Madrone	1933	UP	25588	1-30-33	35099		X		40	60	34,400	51,600	86,000
Embarcadero Rd., Palo Alto	1936	UP	28325	11- 4-35	39084	X			0	100			100,000
University Ave., Palo Alto	1941	UP	32182	7- 8-39	48312	X			0	100			800,000
Polhemus St., San Jose	1940	UP	32396	9-26-39	48841	X			0	100			100,000
Lafayette St., Santa Clara	1936	UP	28375	11-18-35	39844	X			0	100			90,000
Almaden St., San Jose	1936	UP	28323	11- 4-35	39018	X			0	100			75,000
Prunedale-Castroville	1942	OH	34736	11- 4-41	54508	X			0	100			90,000
Salinas	1936	UP	28196	8-26-35	38697	X			0	100			200,000
Dolan Road, Castroville	1937	OH	29612	3-22-37	42369	X			0	100			80,000
Cuesta	1938	OH	30174	9-27-37	43605	X			0	100			150,000
Casmalia	1943	OH	35942	11- 5-42	57927	X			0	100			100,000
												Subtotal	2,011,000

SAN JOAQUIN DIVISION													
Oil Jct. (Original Structure)	1934	OH	25667	2-27-33			X				12,000	Balance	
(Order #25667 modified by Order #26361)			26361	9-25-33		X			0	100			130,000
Oil Jct. (Second Structure)	1948	OH	39687	12- 3-46	75325	X			0	100			280,000
Goshen Jct. (Orig. Structure)	1934	UP	25551	1-16-33	35122		X	X			15,000	64,295	79,295
Goshen Jct. (Second Structure)	1951	OH							0	100			
Ravenna	1949	OH	40288	5-20-47	75670	X			0	100			220,000
Tehachapi	1948	OH	38142	8-14-45	69969	X			0	100			200,000
Woodford-Keene	1948	OH	33765	12-21-40	51829	X			0	100			160,000
Monterey St., Fresno	1948	OH	40301	5-20-47	75669	X			0	100			985,000
Delano	1936	UP	27894	4-15-35	37971	X			0	100			150,000
Famoso	1937	UP	28394	11-25-35	39182	X			0	100			150,000
Caliente	1934	UP	26684	12-27-33	35660	X			0	100			130,000
Russ-Lang (Line Change)	1938	OH	31050	6-27-38	45580	X			100	0	12,988	0	12,988
Humphries	1939	OH	30689	3-14-38	45030	X			0	100			40,000
										Subtotal	39,988		2,528,284

Sheet 8

Location	Year Built	Over or Under	PUC Order No.	Date of Order	Audit No.	BASIS OF PUC ORDER: Agreement Between Parties	BASIS OF PUC ORDER: PUC Decision	BASIS OF PUC ORDER: On Benefits	APPROXIMATE COST: % SP Co.	APPROXIMATE COST: % Others	APPROXIMATE COST: $ SP Co.	APPROXIMATE COST: $ Others	APPROXIMATE COST: $ Total
LOS ANGELES DIVISION													
El Rio (Widening Only)	1948	UP	41756	6-22-48		X			0	100			240,000
Benham (Widening Only)	1950	OH	42402	10-11-49	82363	X			0	100			100,000
Kaiser	1948	OH	39599	11- 4-46	F-3809	X					95,500	104,500	200,000
Salsipuedes St., Santa Barbara	1948	OH	39284	7-30-46	74030	X			0	100			450,000
Anaheim St., Wilmington	1948	OH	38174	8-28-45	70186	X			0	100			800,000
Nicholson Ave., Wilmington	1948	OH	38769	3-12-46	70186	X			0	100			150,000
San Fernando Rd., Burbank	1942	UP	33663	11-12-40	51599	X			0	100			225,000
Figueroa St., L. A.	1937	OH	28416	12- 2-35	39226	X			0	100			400,000
Figueroa St., L. A.	1942	OH											
Vignes St., L. A.	1940	UP											
Macy St., L. A. (Laupt Job)	1940	UP	26399	10- 4-33	38843		X				178,402	1,227,058	1,405,460
										Subtotal	273,902	1,331,558	3,970,460

Sheet 9

Daly St., L. A.	1939	OH	31176	8- 8-38	45866	X			0	100			100,000
Soto St., Aurant	1936	OH	28395	11-25-35		X			0	100			85,000
Rosemead Blvd., El Monte	1938	UP	30527	1-17-38	44364	X			0	100			120,000
Pomona	1940	OH	31559	12-12-38	47397	X			0	100			130,000
Beaumont	1936	OH	28392	11-25-35	39532	X			0	100			125,000
Fingal	1940	UP	31560	12-12-38	47095	X			0	100			135,000
Myoma	1936	OH	28360	11-12-35		X			0	100			135,000
Dulah-Ventura	1935	OH	26749	1-22-34		X			0	100			110,000
(Replacing old subway)													
Lankershim Blvd., Hewitt	1939	UP	30529	1-17-38	44385	X			0	100			125,000
Tunnel (Reconstruction)	1935	UP	25818	4-10-33		X			0	100			100,000
												Subtotal	1,165,000

Location	Year Built	Over or Under	PUC Order No.	Date of Order	Audit No.	BASIS OF PUC ORDER: Agreement Between Parties	BASIS OF PUC ORDER: PUC Decision	BASIS OF PUC ORDER: On Benefits	APPROXIMATE COST: % SP Co.	% Others	$ SP Co.	$ Others	$ Total
N.W.P. R.R.													
Linden Lane, San Rafael	1948	UP	34763	11-18-41	NWP-3787	X			0	100			140,000
S.D. & A.E. RY.													
La Mesa (Alvarado Canyon)	1949	OH	41471	4-13-48	SDAE-1196	X			0	100			150,000
La Mesa (El Cajon Blvd.)	1938	OH	30772	4-11-38	SDAE-253	X			0	100			130,000
"F" St., Chula Vista	1950	UP	43074	6-28-49	SDAE-1333	X			0	100			170,000
18th St., National City	1950	UP	43074	6-28-49		X		X	10	90	25,067	225,603	250,670
24th St., National City	1950	UP								Subtotal			840,670
										Total	564,626		22,058,944



Exhibit H

SUMMARY OF STATE STATUTES AND PRACTICES IN RESPECT TO COST ALLOCATION

The various provisions applying in the different states are listed below, together with the statute reference. Usually the statutes also provide that the parties may otherwise agree as to the allocation of costs.

Note: Whenever in any state any federal funds are used, even in part, the maximum allocation to the railroads is 10 per cent under federal law, and irrespective of state law or practice.*

Allocation of 25% or Less to Railroads

Florida—No state funds allocation statute, but a statute of cooperation with Federal Aid-Road Act and use of Federal Funds, with 10% limit to railroads controlling Fla. Stats. Secs. 341.621 and 341.73.

Indiana—20% of cost including structures and approaches. Burns Indiana Stats., Secs. 55-1810 and 36-130.

Maryland—25% of project on a State Highway. Flack's Code 1939-1947, Art. 89B, Secs. 27 to 32, incl.

Michigan—Based on benefit to railroad but not in excess of 15% of cost. Michigan Stats. Ann., Vol. 7, Sec. 9.1145 (1939 Amd.).

Nevada—No statute; but Federal funds are used and 10% limit is controlling.

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*Federal-Aid Highway Act of 1944 (58 Stats 838) extended by Federal-Aid Highway Act of 1948 (62 Stats 1105) and extended by Federal-Aid Highway Act of 1952 (Public Law 413, 82nd Congress Chap. 462 enacted June 25, 1952) and United States Bureau of Public Roads General Administrative Memorandum No. 325

New Jersey—15% of the cost excluding paving, curbs, walks and guard rails. N.J. Stats. Ann., Title 48, Sec. 48:12.62 (1947 Amd.) and Sec. 48:12-68 (1947 Amd.).

New Mexico—Not to exceed 10% of cost between grade separation limits. Comp. Stats., Sec. 74-338.

New York—Based on benefits to railroad but not to exceed 15% of project cost; however, railroad's share is nothing on State throughways and arterial routes in cities. Article VII, Sec. 7 of Constitution, and Title 22, McKinneys Consolidated Laws of New York, Secs. 8051 and following.

Ohio—15% of cost of project, including structure, approaches, guard rails, drainage, pavement within width of railroad right-of-way, change of railroad grade, right-of-way expense and damages. Secs. 1182, 1182-1 to 1182-21, 6956-22 to 6956-39, and 8869, Page's Ohio Gen. Code Ann.

West Virginia—10% of total cost of project. Code of W. Va. (1949), Sec. 1470.

Allocation Fixed by State Agency

Arizona—Set by State Corporation Commission. Sec. 69-229, Code 1939.

California—Set by Public Utilities Commission. Sec. 1202, Public Utilities Code. When State Highway Commission funds only (no Federal aid) are used for an elimination involving the closing of an important grade crossing, the practice has been that the railroad pays 10%, but if no important crossing is closed, the State pays 100%. Where Federal funds are involved, the division of cost follows Bureau of Public Road's General Administrative Memorandum No. 325.

Colorado—Set by Public Utilities Commission. Sec. 30, Chap. 137, 1935 Col. Stat. Ann.

Connecticut—Set by Public Utilities Commission for projects on State highway system. Set by PUC between 50 and 100% for projects not on State system. Secs. 1518 and 1519, Gen. Stat., Rev. of 1930; and Title 40, Chap. 260, Secs. 5487-98 and 2251-4 of General Statutes (Rev. 1950).

Delaware—Set by State Highway Department or by Chancellor. Chap. 236 Laws 1937 amending Sec. 22, Chap. 166 Revised Code of Del. of 1935 (Sec. 5741).

Idaho—Set by Public Utilities Commission. Sec. 62-301 to 62-305, Idaho Code—1949.

Illinois—Set by Illinois Commerce Commission. Sec. 58 of Pub. Util. Act (Rev. Stat., 1951, Chap. 111 2/3 Sec. 62).

Iowa—Set by State Commerce Commission. Code of Iowa, 1950, Chap. 478, Sec. 478.21 and 478.23.

Massachusetts—Share of cost, exclusive of federal aid, determined by board appointed for the purpose upon basis of benefits. Ann. Laws, Chap. 159; Sec. 70.

Minnesota—Set by Minnesota Railroad and Warehouse Commission and on state trunk highways apportioned on benefits to parties. Chap. 219, Sec. 219.40, Minn. Stat. Ann. (1951).

Montana—Set by Board of Railroad Commissioners and the Public Service Commission. Sec. 72-707, Montana Stat.

Nebraska—For rural projects, by agreement or by State Railway Commission. For urban projects, set by local authority on a benefit basis. Revised Stats. Neb. Sec. 18-601 to 636 (1949 Amd.) and Sec. 75-430 to 432.

New Hampshire—Set by Public Service Commission. Chap. 299, Rev. Laws of New Hamp. 1942, Sec. 4 amended by Chap. 203 Stats. 1951 Sec. 3.

North Dakota—Set by State Public Service Commission. N. D. Stat., Secs. 24-0910, 24-0911.

Oregon—Set by Public Utilities Commission for all projects except those in cities of 100,000 population or over. Chap. 44, Art. 1, Secs. 113-501, 113-502, 113-513.

Texas—Determined by agreement. No law applying.

Utah—Set by State Public Utilities Commission. Ann. Code 1943, Sec. 76-4-15.

Virginia—State Corporation Commission apportions costs to railroads on benefits. Stat. Ref.: Code of Va. (1950), Sec. 56-366 (1952 Amd.).

Washington—State Public Service Commission apportions costs on benefits, except when a new railroad crosses an existing highway (when 100% to railroad). Also law restricted in cities less than 20,000. Revised Code of Wash. (1951) Sec. 81:52.180.

Wisconsin—Determined by order of State Public Service Commission. Stats. 1951 Sec. 195.29.

Wyoming—Set by State Public Service Commission. Comp. Stat. 1945 (amended 1947), Sec. 64-214.

Allocation Fixed at Not Less Than 50%

Alabama—50% or more, for full width of RR R/W. Title 23, Sec. 35, Code of Alabama—1940.

Arkansas—State Highway Commission may join with railroad and pay not more than 50%. Ark. Stat. 1947 Ch. 76-517.

Georgia—50% applicable to the structure and 300 feet of approaches on each side from center of tracks. Chap. 95-19, Code of Georgia, Sec. 95-1905.

Kansas—50% or more, applies to State highways, no percentage to county highways; exact amount determined by State Highway Commission. Gen. Stat. of Kansas (1949) Secs. 68-414 and 68-509.

Kentucky—50%, limited to work on State highways within RR R/W when RR was built across highway before March 23, 1936; 100% in case RR was built later. Fifteen percent when project is in one of three largest cities. Kentucky Rev. Stat. 177.170 and 93.300.

Louisana—50% in cities. Determined by agreement outside cities. Act 1924, No. 38, Secs. 1 and 2; 1928, No. 51, Sec. 1.

Maine—50%. Chap. 41, Secs. 63 to 66, and Chap. 84 Secs. 47 to 50; Rev. Staf. 1944.

Mississippi—50% across the railroad R/W at State highways. Sec. 8039, Title 30, Miss. Code, (Ann. 1942, Amd. 1948).

Missouri—Set by Public Service Commission; provided, in case of State highways, the State Highway Commission bears not more than 50%. Rev. Stat. 1949 Sec. 389.640.

North Carolina—In case of underpass, 50% of cost of excavation, superstructure, and foundation through the railroad fill excavation. In case of overpass, 50% of cost of bridge spanning tracks and abutments thereto. General Stats. N. C. Sec. 136-20.

Oklahoma—Set by Oklahoma Corporation Commission at 50% or more. 17 Okla. Stat. (1941), Secs. 81, 82 and 84.

Pennsylvania—Set by State Public Utilities Commission. Generally, 40 to 50%, except in case of reconstruction the share is about one-third of total cost excluding pavement cost on State highways.

South Carolina—50%, with qualifications. Share also may be determined by agreement. Chap. 160-A, Civil Code, 1942, Secs. 8465, a and b, and 8467.

South Dakota—Set by State Public Utilities Commission, guided by statute, generally about 50% of project. S. Dakota Code of 1939, Title 28, Chap. 28.11, Sec. 28.1101.

Tennessee—50% of project excluding pavement. Sec. 2638 to 2643, Williams Tennessee Code (1934).

Vermont—If railroad first—not less than 45%. If highway first—not less than 50%. Chap. 406, Rev. 1947, Vermont Stat., Sec. 9625-9635.

Exhibit J

SUMMARY OF FACTS

The Opinion of the Commission (Appendix, pages 20-34) briefly summarizes some of the evidence and exhibits. Certain evidence—such as that relating to drainage—not material to this proceeding has been omitted from this summary.

Los Feliz Road, sometimes called Los Feliz Boulevard, hereafter referred to as Los Feliz, is an east-and-west main highway that crosses the Southern Pacific Company railroad tracks at grade. The westerly side of the railroad right-of-way is the boundary line of the City of Los Angeles on the west, and the City of Glendale on the east, both of which cities are located in the County of Los Angeles. (Ex. 19) Los Feliz carries about 27,000 vehicles a day (Exhibit 2), while the railroad operates about a maximum of 70 train movements across Los Feliz (Rep. Tr. pp. 32-33) (including main line passenger, freight and switching movements) (Exhibit 2). San Fernando Road is a north-and-south State and Federal Highway (U.S. 99), located about 850-1000 feet east of the railroad and parallel to the railroad. San Fernando Road handles about 40,000 vehicles a day, and Los Feliz intersects San Fernando Road at right angles.

The Southern Pacific railroad right-of-way in question was acquired in 1873 (Exhibit 11) and a railroad constructed thereon in 1874 (Rep. Tr. p. 238). Thereafter, some time between 1887 and 1912, Los Feliz was established and first used as a crossing of the railroad (stipulation, Rep. Tr. p. 225-226).

Due to topography, Los Feliz is an important highway between various geographical population centers in Southern California (Rep. Tr. p. 19-20). It serves the population centers of West Los Angeles—Hollywood, San Fernando Valley, La Crescenta Valley, Antelope Valley, San Gabriel Valley and the Harbor (Rep. Tr. p. 20 and 26). There is a 170-square-mile area of highly urbanized development that pours highway traffic through Los Feliz because of the "mountain pass or bottleneck of highways, or topography" (Rep. Tr. p. 21, lines 2-11). Los Feliz is a major traffic artery on the master plan of highways of the County of Los Angeles, the City of Los Angeles, and the City of Glendale (Rep. Tr. p. 23, lines 15-17). Los Feliz will receive increased traffic when the freeways are constructed, as the freeways will permit a greater area of traffic to be tributary to the Los Feliz cross-connection (Rep. Tr. p. 25-26).

Los Feliz is a very important segment of the master highway plan of Los Angeles County (Rep. Tr. p. 27), and the failure to separate Los Feliz will cause a weakening and have very serious adverse effect upon the highway system plan of Los Angeles County (Rep. Tr. p. 27). Los Feliz carries over 27,000 vehicles per day (Exhibit 2), including Sundays (Rep. Tr. p. 28, l. 16), on which day the traffic is mainly recreational (Rep. Tr. p. 29, line 15, to p. 30, line 8).

Industrial trucking moves on Los Feliz to reach commercial and industrial centers within the metropolitan area (Rep. Tr. p. 28).

J. G. Hunter, Assistant Director and Chief Engineer of the Transportation Department of the Public Utilities Commission, a Commission witness, testified that conferences were called with the interested parties, and these repre-

sentatives under his direction, through sub-committees, prepared a report (Rep. Tr. p. 7-8). Exhibit 2 was the culmination of the work of the sub-committees, and was prepared by the witness as chairman of the representatives of the parties working upon the study and as a Commission exhibit. Exhibit 3 (Rep. Tr. p. 16) consists of photographs, detailed maps, and charts of the Los Feliz area and proposed separation (Rep. Tr. p. 17-8).

J. A. Mellen, Planning Director of the City of Glendale a Commission witness, testified he was a sub-committee member, for Part I of Exhibit 2, entitled "Related Freeways and Major Highway Arteries" (Rep. Tr. p. 19); that Los Feliz is a road of great importance because of topography (Rep. Tr. p. 19), and leads to many population centers of Southern California (Rep. Tr. p. 20). Some 27,000 vehicles flow through the bottleneck known as Los Feliz (Rep. Tr. p. 21). Los Feliz is an independent route not shown on any of the freeway routes or plans (Rep. Tr. p. 25), and the construction of freeways will not relieve the volume of traffic on Los Feliz (Rep. Tr. p. 25); but the construction of the proposed freeways will throw more traffic into Los Feliz (Rep. Tr. p. 25-6). Because of Los Feliz' natural position, it is quite improbable any other location would be similarly affected (Rep. Tr. p. 26). Major traffic arterials tributary to Los Feliz and shown on officially adopted highway plans are:

> "To the west and south, Hollywood Blvd., Sunset Blvd., and Santa Monica Blvd., via Western and Vermont Ave.; Griffith Park Blvd., Rowena Ave. and Sunset Blvd. to Los Angeles; Riverside Drive to Los Angeles; Western Ave. and Vermont Ave. to Torrance, the Los Angeles Harbor and Southwest industrial areas and

bay cities; La Brea Ave. to the International Airport at Inglewood. To the north and east: San Fernando Road, to Burbank and the San Fernando Valley (east end) and to U.S. 99; Brand Blvd. to Glendale, Glendale Ave. and Verdugo Road to the La Crescenta Valley; Glendale Ave. and Colorado Blvd. to Eagle Rock, Pasadena, the upper San Gabriel Valley, Foothill cities and to U.S. 66; and to the Chevy Chase, Flintridge, La Canada and Linda Vista Rd. to Antelope Valley via Glendale Ave., Verdugo Road, the Angeles Crest Highway and the Sierra Highway." (Ex. 2, p. 5)

Los Feliz is a very important segment in the complete highway plan of Southern California (Rep. Tr. p. 27). The most densely populated areas of Los Angeles County use Los Feliz (Rep. Tr. p. 27).

Because of delay and inconvenience to vehicular traffic, there is an enormous economic loss (Rep. Tr. p. 29); the charts and plates attached to Section I of Exhibit 2 show the importance of Los Feliz crossing.

Hugo H. Winter, Street and Parkway Design Engineer, Bureau of Engineering, City of Los Angeles, a Commission witness, testified he was chairman of a sub-committee that prepared Part II of Exhibit 2, entitled "Estimate of Cost of Effecting the Los Feliz Separation Including Property Damage," and Part III, entitled "Storm Drain Problem". An underpass was recommended in place of an overpass. He testified as to the details of the underpass, and the estimated costs (Rep. Tr. p. 34-40).

J. C. Albers, City Engineer and Street Superintendent of the City of Glendale, a Commission witness, testified regarding Part IV of Exhibit 2, entitled "Traffic Checks". The vehicle count of June, 1951, shows during a twenty-four

hour period there were 27,425, 25,946, and 26,803 vehicles respectively on three different days that crossed the railroad tracks. He developed vehicular delay figures. (Rep. Tr. p. 41-3).

James K. Gibson, Supervising Transportation Engineer of the California Public Utilities Commission, a Commission witness, testified regarding Part V of Exhibit 2, entitled "Economic Justification for the Separation" (set forth in full on pages 86-91 of Appendix and made a part hereof by reference). He said that Part V is self-explanatory, that he took the vehicular delay figures that Mr. Albers developed, and assigned an accepted (Rep. Tr. p. 47) monetary value to the vehicular delay (Rep. Tr. p. 45). He likewise determined the railroad's operating costs at the crossing, the costs of watchman and protection of the crossing, and the amount of damages paid by the railroad (Rep. Tr. p. 45), etc. He substantiated the additional depreciation and maintenance of the bridge structure (Rep. Tr. p. 45).

Mr. Walker Paul, Assistant to the Chief Engineer of Southern Pacific Company, a Commission witness, testified (October 3, 1951) regarding Part VI of Exhibit 2, entitled "Availability of Critical Materials". Since the report, the steel situation had become extremely acute, and the copper situation was still extremely critical (Rep. Tr. p. 51). The steel situation was such that he could not hazard a guess as to when steel would be available (Rep. Tr. p. 51). It would not be prudent to commence the project until all materials were arranged for or available (Rep. Tr. p. 55); he would not recommend that rights of way be acquired, until it was known how the whole matter could be programmed (Rep. Tr. p. 38).

J. A. Mellin, Planning Director of the City of Glendale, recalled as a Commission witness, testified that all trains proceed slowly across Los Feliz (Rep. Tr. p. 67); that San Fernando Road is about 850 feet east of the railroad tracks and crosses Los Feliz at right angles; that during periods of congestion the traffic on Los Feliz backs up from the railroad tracks into San Fernando Road, and causes congestion for three-fourths to a mile on San Fernando Road (Rep. Tr. pp. 69-70). San Fernando Road is a state highway that carries 30,000 to 45,000 vehicles a day (Rep. Tr. p. 70).

James K. Gibson, Supervising Transportation Engineer of the California Public Utilities Commission, recalled as a Commission witness, testified that he did not attempt to apportion the cost (Rep. Tr. p. 115) shown in Part V of Exhibit 2 (Appendix pp. 86-91); that his information was that there would be no benefit to the railroad, so far as switching costs were concerned (Rep. Tr. p. 118).

J. C. Albers, City Engineer and Street Superintendent of the City of Glendale, recalled as a Commission witness, testified regarding previous traffic counts of Jan. 8, 1950, when 17,807 vehicles were counted, other counts in December, 1949, and January, 1950, and regarding vehicular delay (Rep. Tr. pp. 122-3). The delay to traffic on Los Feliz causes persons who wish to make a right-hand turn from San Fernando Road to Los Feliz to back up and congest San Fernando Road (Rep. Tr. p. 128). San Fernando Road carries approximately 40,000 vehicles per 24 hours, compared to the 25,000 to 27,000 vehicles carried by Los Feliz (Rep. Tr. p. 132).

Charles G. Beers, Assistant District Traffic Engineer, California Division of Highways, District 7, testified on behalf of the Division of Highways. He is a licensed engineer and makes special surveys and investigations involving traffic planning (Rep. Tr. p. 148). San Fernando Road is also known as State Highway Route 7 (Rep. Tr. p. 148), and Route 4 (Ex. 9). A special study of traffic conditions was made at Los Feliz and San Fernando Road, and the report is Exhibit 9 (Rep. Tr. pp. 149-156). The delay at San Fernando Road would occur during the peak movement of traffic, when vehicles making right-hand turns from San Fernando Road to Los Feliz would be prevented by an accumulation of vehicles on Los Feliz waiting for the trains to clear (Rep. Tr. p. 152, and p. 3 of Ex. 9). He concluded that train movements across the existing crossing of Los Feliz do affect San Fernando Road traffic on occasions, but the occasions are not regular and minor in effect (Page 3 of Ex. 9, and Rep. Tr. p. 154). There are times when traffic backs up so that it will fill an intersection and block all traffic (Rep. Tr. p. 160). At the intersection of Los Feliz and San Fernando Road there is a sizeable accident record, but it is not considered excessive in view of the large volume on both streets, and the high percentage of trucks (Page 2 of Ex. 9).

Ralph T. Dorsey, Principal Traffic Engineer of the City of Los Angeles, for the City of Los Angeles, testified, after it was stipulated that he was thoroughly qualified, and an eminent specialist in his field (Rep. Tr. p. 177), that he had made studies of the traffic conditions at Los Feliz; that in his opinion traffic at Los Feliz and San Fernando Road is

affected by delays at the railroad grade crossing (Rep. Tr. p. 179); that during the peak hour the actual count of vehicles during a 15-minute period exceeds the storage capacity between the railroad and San Fernando Road (Rep. Tr. p. 179-181), so that other vehicles are not able to get into this area.

The future of Los Feliz is that it will carry a great deal of additional vehicular traffic (Rep. Tr. p. 185). The expected population increase will be reflected in a per capita use of automobiles (Rep. Tr. p. 185). There will be a change of traffic trends, adding more vehicles, due to the completion of the Hollywood Freeway (Rep. Tr. p. 185). The building of the Riverside Freeway will add more vehicles (Rep. Tr. p. 185). The widening of Franklin and Western Avenues, now under way in the City of Los Angeles, will remove a restriction from a by-pass, and add vehicles to Los Feliz (Rep. Tr. p. 185). It is because of this expected increase of vehicles that Los Feliz is now being used up to about 50% of its potential use (Rep. Tr. p. 186). Today, without this anticipated increase in vehicular traffic, a delay of 4 minutes at the railroad will back up 151 automobiles in an area that can handle or store 108 (Rep. Tr. p. 187). Additional cars "backlash" across San Fernando Road, and tie up traffic (Rep. Tr. p. 187-8). Any delay of 4 minutes or more will have an adverse effect on San Fernando Road, because of this backlash (Rep. Tr. p. 188).

When the railroad gates are down, the effect is to backlash and repeatedly tie up San Fernando Road (Rep. Tr. p. 189).

The principal additional benefits to Glendale of the separation would be the elimination of blocking at San Fer-

nando; and the state is benefited because it can move additional traffic on San Fernando Road (Rep. Tr. p. 191).

With the completion of the widening of Franklin and Western Avenues in the City of Los Angeles within a year (Rep. Tr. p. 196), the 380 cars th[illegible]se Los Feliz within a 15-minute period will increase. It is expected that the future volume of vehicular traffic will increase tremendously, and the present peak will be usual during the off-peak hours (Rep. Tr. p. 197).

A true copy of the original deed to the property in question to the Southern Pacific Railroad Company, for a 100 foot right-of-way in the area in question, dated and recorded in 1873, was introduced into evidence as Exhibit 10 (Rep. Tr. p. 200). A second deed between the same parties, dated and recorded in 1877, relating to a station site on each side of the 100 foot right-of-way, was introduced into evidence as Exhibit 11 (Rep. Tr. p. 201).

Two agreements (of 1936 and 1940) were then introduced as Exhibits 13 (1936) and 14 (1940), between the City of Glendale and petitioner; which agreements gave the City of Glendale an easement across the railroad right of way for Los Feliz, wherein it was provided the grant of the easement for the highway was subject and subordinate to the prior and continuing right of the railroad, to use and maintain its entire railroad right of way and property, in the performance of the railroad's public duty as a common carrier (Ex. 13 and 14, and Rep. Tr. p. 202).

Various letters and correspondence leading up to the execution of Exhibit 13 were introduced as Exhibit 15 (Rep. Tr. p. 204-5).

Leo C. Johnson, Chief Draftsman, Engineering Department of the Los Angeles Division of the Southern Pacific Company, a witness for Southern Pacific Company, stated that he was in charge of the drafting room of the Engineering Department, and had in his custody the early documents relating to Los Feliz (Rep. Tr. p. 206-7); that these early documents are used by him and the 40 men under his direction in the course of their work and are original records (Rep. Tr. p. 206). The earliest map is a location profile map of 1873, certified to by the Chief Engineer and President of the Southern Pacific Railroad Company, and this map shows no highway or road at the present crossing of Los Feliz and the railroad (Rep. Tr. p. 209); although San Fernando Road can be located at its present location (Rep. Tr. p. 209). Exhibit 16 is an 1876 profile of the railroad in the area in question, and shows no Los Feliz, although it does show the railroad in place (Rep. Tr. p. 211-2, and Ex. 16).

It was stipulated that the Los Feliz road grade crossing was first established some time between 1887 and 1912, and has been used ever since it was established as a crossing by the public (Rep. Tr. p. 225-6).

Glendale in this area was formerly Tropico (Rep. Tr. p. 228); Tropico was first established as a station in 1887 (Rep. Tr. p. 231), and later became Glendale (Rep. Tr. p. 231). Los Feliz was originally Tropico Blvd. (Rep. Tr. p. 237).

The railroad commenced operation in 1873 or 1874 (Rep. Tr. p. 237-8).

Harry R. Gernreich, Superintendent of the Los Angeles Division of the Southern Pacific Company, a witness for Southern Pacific Company, testified that he was the chief operating officer of the Los Angeles Division; that the maximum length of trains operated is 100 cars; that because of length of sidings and yard tracks, it would be impossible to operate longer trains (Rep. Tr. p. 243-4); that the average length of a freight car is 50 feet (Rep. Tr. p. 245); that because of the volume of rail traffic trains cannot be stopped on the main line without tying up all operations (Rep. Tr. p. 244-5); that a separation of the grade crossing at Los Feliz would not be of any benefit to the railroad (Rep. Tr. p. 246-7 and 266), so far as switching and main-line movements are concerned (Rep. Tr. p. 247 and 266).

The crossing gates at Los Feliz are so arranged that no one can get caught between them (Ex. 19 and Rep. Tr. 249). As traffic approaches the crossing on its half of the street, there is a gate in front of the tracks, but there is no gate on the far side of the tracks (Rep. Tr. p. 249); so if a motorist gets by the gate protecting the tracks, and gets out on the tracks, there is nothing to prevent him from going through (Rep. Tr. p. 249). Likewise on the other half of the street for traffic coming in the opposite direction, there is a similar situation, and one cannot get locked between gates (Rep. Tr. p. 249-50, 257-8).

Passenger trains do not stop on Los Feliz (Rep. Tr. p. 250-2).

The coast and valley lines of the railroad operate over Los Feliz. The maximum number of cars up the coast line is 100 empties, empties and loads, or 75-80 cars with heavy

loads; while on the valley line the maximum number of cars is 86 (Rep. Tr. p. 253-4).

There are 10 to 12 trains a day of more than 90 cars that cross Los Feliz (Rep. Tr. p. 256).

The industries in the area in question prefer *night* switching, so that the plant switching will not interfere with their employees loading and unloading cars, and doing other work (Rep. Tr. p. 261). The amount of switching has been static, and about the same, for a number of years (Rep. Tr. p. 262). If Los Feliz were separated, there would be no savings to the company, in money paid to the switching crews (Rep. Tr. p. 266).

Walker Paul, Assistant to the Chief Engineer of Southern Pacific Company, recalled as a witness for Southern Pacific Company, testified (Nov. 1, 1951) concerning the critical situation of material (Rep. Tr. p. 269-273), and stated that the situation since the commencement of the hearings had become so nebulous, that he would hesitate to make a recommendation that work could even be started within a three-year period assuming, of course, that the defense program is continued at the same rate, or is accelerated (Rep. Tr. p. 272-3).

Exhibit 20 was introduced (Rep. Tr. p. 277 as a recapitulation of Exhibit No. 2 (Part V, page 28, reproduced in Appendix pages 86-91). This exhibit (20) shows the net annual benefits to the railroad as follows:

BENEFITS TO PUBLIC AND RAILROAD THROUGH SEPARATION

(Recapitulation of Exhibit No. 2 (Page 28)

Railroad operation cost (gatemen, maintenance, etc.)	$14,053	
Accident damages paid by RR	475	$14,528
Depreciation on RR portion of structure	6,991	
Maintenance of same, excluding track	1,620	8,611
Net annual benefit to railroad		$ 5,917
Above net savings capitalized at 5%		$118,340

The witness further stated:

> "The matter of participation by the railroad should be predicated on the benefits to the railroad, but being an annua. charge, should be capitalized, or an annual credit, as it is in this instance. In discussing the capitalized benefits to the railroad, it is essential that we use a rate of return which would correspond to what it would cost our company by way of interest if it were to borrow money in the open market on a long term basis."

(Rep. Tr. p. 274, l. 18-25) The cost of money over a long-term basis to Southern Pacific Company is 5% (Rep. Tr. p. 275). The capitalized benefit to the Southern Pacific Company will be $118,340 (Rep. Tr. p. 275), and is the maximum the Southern Pacific Company should be required to contribute (Rep. Tr. p. 275).

J. C. Wright, Assistant Trust Officer of the Farmers and Merchants National Bank of Los Angeles, a witness for Southern Pacific Company, stated his qualifications (Rep. Tr. p. 288-90) and that the cost of money over a long-term on an unsecured basis to the Southern Pacific Company was 5% (Rep. Tr. p. 290). This was the cheapest form of money the Southern Pacific Company could obtain under the facts

of the case (Rep. Tr. pp. 293-300) for the purposes involved in this matter.

Roger W. Jessup, Chairman of the Board of Supervisors of Los Angeles County, appeared as a witness for the County of Los Angeles, and testified the County was anxious to do its share in helping out the cities and state in regard to the cost of the grade separations, but he did not know what the Board of Supervisors would contribute (Rep. Tr. p. 301). He further stated:

> "I do feel that we could contribute a substantial amount, due to the fact that we gave to the Cities of Los Angeles County outside of this gasoline tax money, outside of the moneys given, based on a formula, which is each and every year, we gave them, last year, an extra $1,750,000 or sixty thousand dollars. That was above that system, the moneys that we had given based on a formula basis. From that amount I would say that the Board would give quite a substantial amount towards this cost.
>
> Q. How is that programed each year? Do you make a budget?
>
> A. Yes.
>
> Q. And you spell out how the money shall be spent?
>
> A. That is right. We spell out to this extent, that we gave to the cities last year the moneys from the gasoline tax, their share, at least, I would say on this Formula 316, and then we had over that amount, we had $1,750,000. That, of course, we just gave them, and although we did earmark moneys to be spent in certain projects, not very much but some.
>
> Q. Does the Board have that authority to assign this money, this gasoline money? A. Above that three-sixteenths. Well, we really have all of it. We have the authority to do all of it, but we do have a general

agreement that we contribute a certain amount unearmarked, leave that up to the various cities."

(Rep. Tr. pp. 301-2)

Walker Paul, Assistant to the Chief Engineer of Southern Pacific Company, further recalled as a witness for Southern Pacific Company (Nov. 29, 1951), on cross-examination stated that the Bureau of Public Roads felt that unless a grade separation project is something absolutely vital to defense work, it should not be undertaken at this time (Rep. Tr. p. 309); that the average accident cost on Exhibit 20, of $475 per year, was computed on the basis of the actual accident damages paid for the last 10 years (Rep. Tr. p. 313). The past experience at Los Feliz disclosed a very *limited number* of accidents (Rep. Tr. p. 314). The principal trouble at Los Feliz was the breaking of gates (Rep. Tr. p. 314). The trains in this area are operating at slow speed (Rep. Tr. pp. 315-6). The tower man at the gates has visibility, and will have no trouble with backlashes at the railroad (Rep. Tr. p. 316).

The proposed separation at Los Feliz will be of no benefit to the railroad patrons going to the Glendale station, for the vehicles will have to use a more circuitous route (Rep. Tr. p. 322); a considerable number of vehicles going to the Glendale station use Railroad Avenue, and Railroad Avenue will be cut off from the separation structure (Rep. Tr. p. 322).

James J. Canty, Road Foreman of Engines of the Los Angeles Division of the Southern Pacific Company, a witness for Southern Pacific Company, testified concerning his duties as supervising enginemen and that he had been

a fireman on a yard engine that worked over Los Feliz (Rep. Tr. p. 362), that he supervised the engine crews in connection with switching operation at Los Feliz (Rep. Tr. p. 408). He then outlined in detail each and every switching move made by an engine and yard crew across Los Feliz (Rep. Tr. pp. 409-13). A separation of grades at Los Feliz would not save the yard or switch crews any time or eliminate delays to the railroad (Rep. Tr. pp. 411 and 418). Accident or other delays would not increase the wages of the train crews who are paid on a complicated mileage and minimum number of hours basis (Rep. Tr. pp. 414-16 and 421). A separation of grades at Los Feliz would not reduce overtime payments (Rep. Tr. p. 424).

It is to be further noted that the attorney for the Department of Public Works, Division of Highways of the State of California stated as follows (Oct. 3, 1951):

> "Your Honor, on behalf of the Department of Public Works of the State of California, I would like to have the record show that it is the position of the Department of Public Works, Division of Highways, that the proposed grade crossing structure would not be of any benefit to a state highway, would not be of any benefit to the nearest state highway, which is approximately 1000 feet from that grade crossing, being Route 4, also known as San Fernando Road. For those reasons, it is our position that the Commission would be without jurisdiction to impose any portion of the cost of building a grade separation structure on the Department of Public Works, Division of Highways, or to suggest that any portion of such funds be used to construct it." Commissioner Huls: "Your position is noted, Mr. Dolle. I will not rule on it at this time. I will reserve ruling probably until the time of decision." (Rep. Tr. pp. 4-5)

and (November 1, 1951):

Mr. Dolle: "Mr. Commissioner, I would like to have the record show this statement, first. At the beginning of this hearing the statement was made on behalf of the Department of Public Works, State of California, that it was our position that the Commission was without jurisdiction, in any event, to assess any portion of the costs of this proposed separation on Los Feliz Boulevard against the State of California, Department of Public Works, for several reasons, among them being the fact that it would be of no benefit to the State, and that the nearest state highway was approximately 1000 feet from the proposed crossing. With the understanding that we would not prejudice that position and we would maintain that position consistently, we would offer for the assistance of the Commission and for factual information only a traffic study and report made at San Fernando Road and Los Feliz Boulevard by the State of California Traffic Department."

Commissioner Huls: "Very well. We have noted your statement and reiteration of the previous statement. The Commission, of course, will ultimately have to determine the matter of jurisdiction, and whether your presentation is with or without prejudice to the statement you made we will have to determine. Of course, from the legal standpoint, it will not prejudice your right to urge that point." (Rep. Tr. pp. 146-7)

[fol. 129] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

[Title omitted]

ANSWER OF THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA TO PETITION FOR WRIT OF REVIEW—Filed December 19, 1952

To the Honorable Phil S. Gibson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the State of California:

The Public Utilities Commission herewith respectfully submits its answer to petition for writ of review herein.

Preliminary Statement

Petitioner, hereinafter referred to as Southern Pacific, attacks Decisions Nos. 47420[1] and 47597,[2] of June 30 and [fol. 130] August 19, 1952, respectively, issued by this respondent Commission pursuant to Application No. 32385[3] of the City of Glendale for an order or orders authorizing and requiring the construction of a grade separation of the crossing of Los Feliz Road and the main line railroad of said Southern Pacific, designating the portions of the work to be done, respectively, by said City of Glendale, the City of Los Angeles, and said railroad corporation, and allocating the costs thereof among said cities and said railroad corporation.

P. U. C. Case No. 5327—Los Feliz Investigation and Study

Subsequent to the filing of the above numbered application on May 7, 1951, this Commission, on September 25, 1951, issued an Order of Investigation to determine whether or not, "in the interest of public safety, convenience and necessity," the grade separation should be constructed and also to determine "the proportions in which the expense of

[1] Ex. "C", Appendix to Petition.

[2] Ex. "E", Appendix to Petition.

[3] Also pursuant to P. U. C. Case No. 5327 (Exs. A and B, Appendix to Petition.

constructing and maintaining such a separation shall be divided among the Southern Pacific Company, the City of Los Angeles, the City of Glendale, the County of Los Angeles, the Department of Public Works, Division of Highways, of the State of California, or other political subdivisions affected. * * *" P. U. C. Exhibit No. 2 (presented by Commission and other witnesses) in these consolidated [fol. 131] proceedings being a detailed study of the Los Feliz grade separation situation, contains, amongst other matter, the results of an engineering study relative to effecting a grade separation between Southern Pacific Company's tracks and Los Feliz Boulevard, Cities of Los Angeles and Glendale. As stated, it is of composite composition, embracing, as it does, the combined co-operative efforts of the participants concerned.

Location: Los Feliz Road (Glendale)—Los Feliz Boulevard (Los Angeles)

At the aforementioned main line intersection with Southern Pacific, the tracks, consisting of two standard gauge main tracks, one standard gauge passing track and two standard gauge yard tracks, run in a northwesterly-southeasterly direction, while Los Feliz Road, designated as a road in Glendale and a boulevard in Los Angeles, runs in a northeasterly-southwesterly direction. The boundary line between the two cities parallels the tracks in the area of the intersection. Four of the above-mentioned tracks are in Glendale, and one, a spur track, is in Los Angeles. The grade crossing is designated as Crossing No. B-476.8, and the legal description of that portion in Glendale is as follows:

> That portion of the right of way (100 feet wide) of the Southern Pacific described in deeds recorded in Book 14094, page 214, and in Book 17837, page 49, Official Records in the office of the Recorder of Los Angeles County, California.

[fol. 132] The legal description of that portion of the grade crossing in Los Angeles is as follows:

> A strip of land having a uniform width of 30 feet, its northeasterly line being coincident and identical with

the southwesterly line of the Southern Pacific main line right of way (100 feet wide), said strip of land extending from the southeasterly line of Los Feliz (100 feet wide) to the northwesterly line of said Los Feliz.

House Resolution No. 24, California Legislature (1949)

By House Resolution No. 24 of the California Legislature, at its 1949 session, the Commission was directed to initiate proceedings with a view to obtaining grade separations at Los Feliz Boulevard, Glendale-Brand Boulevards, and Fletcher Drive. As a result of this resolution the President of the Public Utilities Commission transmitted a report to the Assembly, dated March 6, 1950, setting forth the results of an engineering study showing the estimated costs, economic justification, and problems of financing of the proposed grade separations.

Assembly Concurrent Resolution No. 88 of the 1951 Session

Subsequent to the foregoing Resolution and Commission Report, the State Legislature, by Assembly Concurrent Resolution No. 88 of the 1951 session, directed the Commission to hold hearings on the Los Feliz crossing, and the Commission's investigation (Case No. 5327) was instituted accordingly.

[fol. 133] Los Feliz Grade Separation Is Number One on the "Top-Priority" List of Los Angeles County Grade Crossing Committee

The instant record shows that not only has the Los Feliz crossing held "top priority" on the list of the Los Angeles Grade Crossing Committee since 1923, but that ensuing years have only emphasized this importance; that Los Feliz Boulevard meantime has reached its capacity and at the present time is carrying an overload, which situation has made it urgent to effect the grade separation. Also, that the stoppage of traffic at the railroad crossing at Los Feliz would cause a "backlash"[4] of traffic that would affect

[4] Backlash is the term used to describe the backing up of traffic from one intersection where it is stopped to block another intersection.

traffic on San Fernando Road. The distance between the railroad crossing and San Fernando Road is 820 feet, which distance is equivalent to a storage capacity of 38 cars in each of the three lanes of traffic. Checks have disclosed that there are times when more than 38 automobiles in each lane are held up due to a train blocking the crossing, and, as a result, the "backlash" of these automobiles congests San Fernando Road. This the proposed grade separation, of course, would also relieve.

Alternate Plans for Proposed Grade Separation

The record carries detailed engineering plans and costs covering each of three proposed plans for the petitioned grade separation, two of which alternatives would be by [fol. 134] way of overpass as against underpass construction in connection with a gravity storm drain as the cheapest of the three plans and which latter was ultimately adopted by the Commission.

Because of the petitioner's asserted doubt as to monetary savings to the railroad, Commission staff studies set up annual estimates covering vehicular delay, railroad operating cost, gatemen, maintenance, accident damages paid by the railroad, the depreciation on the railroad portion of the structure, and maintenance thereof, excluding track, and reflecting net annual savings of some $63,279.00 which savings, capitalized at 3%, 4% or 5%,[5] would produce $2,109,000, $1,582,000, $1,266,000, respectively.

Nevertheless petitioner contended that the grade separation at Los Feliz crossing would be of no benefit to the railroad, and that there would be no saving to the company in money paid to employees, and accordingly estimated net railroad benefit at a mere $5,917 annually. Similarly, petitioner reduced the engineering storm drainage estimate from $249,100 to a sump and pump which it estimated at $28,500, and which latter cheapest minimum was adopted for said drainage, the Commission finding that while the more elaborate gravity storm drain is desirable, yet it

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[5] It should be noted that a bank official testified that the present cost to Southern Pacific of obtaining money on long-term basis is 5%.

would provide drainage for more than the structure area [fol. 135] and, accordingly, the entire cost of such a storm drain should not be included in any costs which are apportioned to the railroad, hence deducted $220,600.00, or the difference between the two preceding sums, and used the petitioner's own calculations covering this very important structure, with construction cost allocations as hereinafter shown.

Construction Cost Allocations for Los Feliz Grade Separation

Suffice it to state that after a full consideration of all of the evidence and with the benefit of briefs filed by the parties in the matter, the Commission found it to be in the interest of public safety, convenience and necessity to make the following cost allocations, as more specifically detailed in its findings, opinion and order, between the several parties involved, to-wit:

> "Of the total cost of the proposed structure, as set out in the foregoing opinion which is estimated to be $1,483,200, fifty per cent (50%) shall be borne by the Southern Pacific Company, twenty-five per cent (25%) by the County of Los Angeles, twelve and one-half per cent (12½%) by the City of Glendale, and twelve and one-half per cent (12½%) by the City of Los Angeles."

As shown in the Commission's decision, other necessary provisions respecting details of construction, the required time limitations for construction, and other appropriate regulations as between the several parties were fully provided therein.

[fol. 136] Despite Unprecedented Public Demands of the Police Power, the Petitioner, Southern Pacific, Refuses to Share in the Cost Allocations for Los Feliz Grade Separation (Even Though Itself a Direct Beneficiary Therefrom) and Requests the Court to Annul and Set Aside the Commission's Orders for the Protection of the Public Safety, Welfare, Convenience and Necessity Involved

The only deductions to be drawn from the petition and the conclusion therefrom is that petitioner has been intrigued by the novel and fallacious theory that regardless of the public safety and welfare, including convenience and necessity therefor, unless the railroad derives a readily calculable direct monetary benefit or financial gain from any Southern Pacific grade crossing separation, it will not share in the necessary expenses incidental to such grade separation or other highway improvement of the kind. Accordingly, notwithstanding "top-priority" demands for the Los Feliz grade separation from petitioner's main line five-track railway intersection, it denies the obvious advantages resultant to it and to the public in general and thereby hopes to escape its responsibilities and obligations as both the major rail common carrier and highway common carrier operating throughout the State of California. For it is both common knowledge and of official notice how petitioner, through its wholly owned truck and bus subsidiaries—Pacific Motor Trucking Company, Pacific Motor Transport and Pacific Electric Railway and Motor Transport system—ranks among the largest highway users in "bringing the rails to your door" and also probably the very largest in point of affiliated Greyhound bus opera- [fol. 137] tions and Railway Express Agency motor express operations through its joint ownership and control of these two additional heavy patrons of the public highways throughout the State, and it is difficult, indeed, to reconcile such facts with petitioner's instant attempt at a blanket repudiation of any and all concern in the public highways of this State. This attempted maneuvering, therefore, whereby petitioner complains and alleges but at the same time flourishes as the largest rail, truck, bus, and express operator within the State, should, in view of blanket denials made in the petition, be kept constantly in mind when considering its evasive and fallacious arguments therein, and when weighing and evaluating the many direct and indirect benefits and advantages inevitably enjoyed by it, as we shall hereinafter explain.

Petitioner concedes that there is no issue as to whether Los Feliz main line grade separation should be built; it likewise concedes the elimination of vehicular delay upon this major traffic artery; but asserts that it cannot benefit

from these results. To quote petitioner: . . . "indeed, to the extent that competitive traffic (including that moving in private automobiles) using Los Feliz or other affected roadways is enabled by this improved facility to move faster or more cheaply, petitioner is damaged instead of benefited." And based on such a premise, it dismisses instanter the entire subject of public safety, welfare, con- [fol. 138] venience and necessity involved, and proceeds to whittle away its proportional allocation to a paltry minimum, which latter it holds up to the Court as being "a contribution against will"—furthering the well-being of others—against which it asserts deprivation of due process and claims of confiscation.

It is submitted that the foregoing bares the fallacy of petitioner's allegations and contentions in attempted circumvention of prevailing regulatory controls clearly applicable to the instant situation but respecting which it suddenly renounces all responsibility in its unprecedented maneuvers to evade its statutory and constitutional obligations and liabilities under the exercise of the police power of the sovereign—the State of California.

Consolidated Hearings of Application No. 32385 and Public Utilities Commission Case No. 5327

With the concurrence of the parties, Commission consolidated hearings of both of the above formal proceedings ensued, with public hearings on October 3, and November 1 and 29, 1951, followed by their joint briefing and decision on the consolidated record thus made as of June 30, 1952.

The record reflects preceding traffic and engineering studies showing, among other things, the estimated cost, including property damage, economic justification, and the matter of financing. And although the instant proceedings [fol. 139] deal with separation of grades at Los Feliz, related freeways and major highway arteries necessary to a proper comprehension of Los Feliz Boulevard in its relation to the entire metropolitan and tributary areas of more than 170 square miles were reviewed.[5]

Owing to the extreme importance of Los Feliz and the

[5] Maps "C" and "D" of Exhibit No. 2.

state-wide consensus respecting the urgency for its grade separation, both Glendale and Los Angeles joined in appropriate resolutions against "maintaining a dangerous grade crossing" (Official Exhibits Nos. 1 to 8) and, considering the economic justifications for said separation, voluntarily committed their political units to such expenditures. Statewide interests participated in said hearings.

Amongst the major economic justifications are several already enumerated on page six herein. As shown in Exhibit No. 2, the so-called 10-year Freeway or master plan of highways, even if it were accomplished today, would have no beneficial effect in reducing traffic on Los Feliz Boulevard or upon the bottleneck[6] that exists at this Southern Pacific main line crossing. Growth in population, industrial expansion, and its gateway for recreational travel attest this fact. Los Feliz is an important traffic artery—a natural important route.[7] And today this highest priority project continues with still greater train, vehicular, and pedestrian movements aggravating the congestion, in- [fol. 140] creasing the delay and inconvenience to said traffic.

Additionally, it should be noted that the existing Los Feliz grade crossing is now protected by manually-operated crossing gates over the entire 24-hour period; that during the period January 1, 1926 to March 31, 1951, fourteen collisions between trains and automobiles have occurred, resulting in one death and nine injuries; that some 27,000 vehicles pass over said intersection in a 24-hour period, the gates being lowered about 70 times a day, i. e., 70 train movements daily; that the total vehicular delay for a 24-hour week day equals 4,500 vehicle minutes or 75 vehicle hours.

The combined engineering report (Ex. No. 2) states: "It is not possible to determine with any fine degree of accuracy the public benefits that might accrue from a grade separation at this location. . . ." No allowance has been made for "the loss of life or injuries resulting from accidents at this crossing, . . . income tax, or depreciation on retain-

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[6] For traffic flows, Map "A".

[7] Maps "B" and "E".

ing walls, wing walls, or maintenance on the slopes." Certain items which do lend themselves to assigned monetary evaluation are as indicated on page 6 herein. For example, the hourly economic loss due to vehicular delay has been estimated at $2 for automobiles, $5.30 for trucks, and $13.50 per hour for buses.

As will be appreciated, the Los Feliz crossing is quite near to petitioner's well known and widely patronized Glen [fol. 141] dale passenger station. Singularly enough, however, petitioner disclaims any benefits from this latter in its blind adherence to the fallacious and illy conceived theory, irrespective of the public safety, welfare, convenience and necessity, that unless it [petitioner] derives a monetary gain or profit from the necessary grade separation of its crossings it will have nothing to do with defraying costs though they be invoked under the police power and in behalf of a statewide public interest, even though petitioner, directly or indirectly, becomes the true and ultimate beneficiary of such improvements.

Public Utilities Commission Decisions Nos. 47420 and 47597 Pursuant to Existing Statutory and Constitutional Mandates

We now set forth the following excerpts from the statutory and constitutional mandates (embracive of powers conferred and duties prescribed) pursuant to which the Commission acted in both Case No. 537 and Application No. 32385, supra, in response to the public interest demands for relief from the dangerous Los Feliz grade crossing and the resultant allocations of costs as ultimately determined in the above orders.

The Public Utilities Commission has the exclusive power and duty to allocate costs of grade separations.

Article XII, Section 22, of the California Constitution provides, in part, that:

> "No provision of this Constitution shall be construed [fol. 142] as a limitation upon the authority of the Legislature to confer upon the Public Utilities Commission additional powers of the same kind or different from those conferred herein which are not inconsistent with

the powers conferred upon the Public Utilities Commission in this Constitution, and the authority of the Legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this Constitution."

Article XII, Section 23, provides, in part:

". . . The Railroad Commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the State of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the Legislature, and the right of the Legislature to confer powers upon the Railroad Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution."

Pursuant to such constitutional provisions the Legislature enacted the Public Utilities Act, now incorporated in the Public Utilities Code. Section 1202 of the Public Utilities Code reads as follows:

"Section 1202. Exclusive Powers of the Commission. The commission has the exclusive power:

"(a) To determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use, and protection of each crossing of one railroad by another railroad or street railroad, and of a street railroad by a railroad, and of each crossing of a public or publicly used road or highway by a railroad or street railroad, and of a street by a railroad or vice versa, subject to the provisions of Sections 1121 to 1127, inclusive, of the Streets and Highways Code so far as applicable.

"(b) To alter, relocate, or abolish by physical closing any such crossing heretofore or hereafter estab- [fol. 143] lished.

"(c) To require, where in its judgment it would be practicable, a separation of grades at any such crossing heretofore or hereafter established and to prescribe the terms upon which such separation shall be

made and the proportions in which the expense of the construction, alteration, relocation, or abolition of such crossings or the separation of such grades shall be divided between the railroad or street railroad corporations affected or between such corporations and the State, county, city, or other political subdivision affected."

The California Public Utilities Commission, in its Decisions Nos. 47420 and 47597, which decisions petitioner is seeking to have reviewed, affirmed a previous holding of the Commission in Decision No. 47344 in which decision the Commission clearly set forth the law when it stated:

"There is no statutory requirement that this Commission follow any particular theory of allocation of costs. Under the theory advanced by the City of Los Angeles that the railroad should pay the additional cost of construction resulting from the presence of the tracks, the railroad's share would amount to about 86 per cent of the total costs. Under the theory advanced by the railroad that it should pay only according to the benefits it receives, and considering its contention that it receives no benefits, its contribution would be nothing.

"The authority of this Commission to allocate costs, as designated in Section 1202 of the Public Utilities Code, supra, is an exercise of the police power on the part of the State of California through the medium of its agency, the Public Utilities Commission. We hold that the law is well established that under the exercise of the police power a state may regulate the crossings of railroads with its highways, and may require grade separations to be erected and maintained, apportioning the costs in the exercise of its sound discretion. (*Erie Railroad Company* v. *Board of Public Utility Commissioners*, 1920, 254 U. S. 394, 65 L. ed. 322; *Chicago, Mil-*
[fol. 144] *waukee and Saint Paul Railway Company* v. *Minneapolis*, 1914, 232 U. S. 430, 58 L. ed. 671; *Missouri Pacific Railway Company* v. *Omaha*, 1914, 235 U. S. 121, 59 L. ed. 157; *Lehigh Valley Railroad Company* v. *Board of Public Utility Commissioners*, 1928, 278 U. S. 24, 73 L. ed. 161.)

Notwithstanding all of the foregoing authority and directives pursuant to and in compliance with which the Commission acted, petitioner argues that the foregoing decisions are arbitrary, unreasonable and unconstitutional, and urges that no railroad grade separation costs whatsoever should be allocated to Southern Pacific unless and until demonstrated that it shall derive a specific monetary benefit or profit therefrom. Throughout this entire "profits" and "benefits" theory, of course, as interpreted by the petitioner, threads the assumption that its railroad has the right of way at a grade crossing, and that vehicular and pedestrian traffic must at all times yield to said railroad. As a matter of fact, there is no logical or legal basis for such contention that the costs of this grade separation should be borne by the parties respectively in accordance with the benefits to be received by them nor are any such benefits mathematically calculable as we shall hereinafter further enumerate and explain.

The cities of Glendale and Los Angeles have uniformly contended that the Railroad should be required to pay that [fol. 145] portion of the total cost which is attributable to the presence of the railroad tracks; that the proper basis of apportionment of the total costs is to assign to the Railroad the amount by which the presence of the railroad increases the cost of the necessary street improvement; and that the cost to the cities of maintaining and improving their city streets should not be increased by reason of the presence of railroads running upon or across them.

The Commission, as disclosed by the evidence adduced and its findings, opinion, conclusions and order, obviously considered, amongst other things, the factors surrounding the entire public interest affected, involving the public safety, welfare, convenience and necessity requiring such grade separation along with the railroad's creation or contribution to a situation wherein said public interests are adversely affected, hence fully justifying the instant orders by way of a proper exercise of the police power of the State.

Petitioner, in the course of its briefing herein, has not

only conceded but has vigorously contended that the solution of the instant situation has been committed by statutory and constitutional provisions to the Public Utilities Commission, citing in its support thereof the following, to-wit:

Sec. 22, Article XII, of the Constitution
Sec. 1202, Public Utilities Code (formerly Sec. 43(b) of the Public Utilities Act of 1915)
Sec. 1219, Public Utilities Code (being the 1933 addition of Sec. 43(d) of the Public Utilities Act of 1915),

[fol. 146] and listing therewith the following cases:

Switzer v. *Atchison, etc., Ry.* (1930), 164 Cal. App. 138, 154
City of San Mateo v. *Railroad Commission* (1937) 9 Cal. 2d 1, 7-9
Northwestern Pac. R. R. Co. v. *Superior Court* (1949) 34 Cal. 2d 454, 457-8.

Petitioner's specifications of error, therefore, simmer to its unsupported challenge of the weight of the evidence, asserted findings contrary thereto, and its allegations as to undue, unreasonable, and excessive burden of cost allocations as between the parties. Respecting these latter allegations, petitioner asserts that the Commission's order would require it to subsidize its competitors and injure its own business accordingly when, as a matter of fact, petitioner, being the largest highway user in this State through its wholly-owned motor trucking operations, its affiliated motor bus passenger business, and its jointly-owned railway truck express operations, stands in the position of the greatest potential beneficiary of all common carriers from any grade separations or other similar highway improvements where the factors of public safety, welfare, convenience and necessity in the public interest are involved.

For support of petitioner's astounding and unprecedented "about-face" in thus repudiating all prior performance in California grade separations of such priority concern, petitioner admittedly relies upon the single case of [fol. 147] *Nashville C. & St. L. R. Co.* v. *Walters*, 294 U. S. 404, the so-called *Nashville* case, for which there is neither precedent nor other foundation in the established law of

the land. Thus petitioner, in its bold venture in advocacy of the spurious "profits" and "benefits" theory, much resembles other familiar figures of "frenzied finance" who ask change for a dollar and a dollar for the change, realizing all too well that eventually someone may possibly make a mistake and it would not be petitioner. As a matter of fact, basically and fundamentally speaking, petitioner could have made no worse selection than the so-called *Nashville* case on which to stake its aforesaid "gamble" in attempted reversal and overthrow of the now firmly established grade separation law of the land.

This is necessarily so because of petitioner's misconception or utter ignoring of both the governing facts and the applicable law in a wholly different Los Feliz Boulevard situation, which will be explained in the ensuing pages.

The So-Called "Nashville" case is wholly dissimilar both as to the governing facts and the applicable law from the instant Los Feliz grade separation case and, as hereinafter explained, the two basically and fundamentally different situations are in nowise comparable.

At the outset it should be stated that the *Nashville* case is no authority for the inference or contention by petitioner that the law has now been changed so that railroads cannot [fol. 148] be required to pay the cost of grade crossing separations. In considering that case the following points should be noted:

1. The Tennessee statute there involved did not confer any discretion upon the Commission but, instead, it required the railroad in every case to pay one half the cost of a grade separation (79 L. ed. 949, at 954). Here, however, our statute gives to the Commission discretion to allocate the costs and does not purport to make an arbitrary assessment against the railroads.

2. In the *Nashville* case the railroad conceded "*that in Tennessee, as elsewhere, the rule has long been settled that, ordinarily, the State may, under its police power, impose upon a railroad the whole cost of eliminating a grade crossing, or such part thereof, as it deems appropriate.*" (P. 954 —Emphasis added.) The claim of unconstitutionality in that case rests wholly upon the special facts shown. There-

fore, the issue as to what portion of the cost should be borne by a railroad in a grade separation such as we are concerned with in this proceeding was not even an issue in the Nashville case. The railroad conceded that in such a case it could be required to pay the entire cost!

3. The only point decided by the Supreme Court of the United States was that the Supreme Court of Tennessee erred when it refused to consider the special facts in that case. And all the Supreme Court of the United States did was to remand the case to the Tennessee court for con- [fol. 149] sideration of those special facts. The Supreme Court of the United States did not purport to determine that even under the special facts there involved it was unconstitutional to assess one-half of the cost against the railroad. Instead, it expressly stated that it was not making such a determination, which was in the first instance, for determination of allocation of costs by the Tennessee court (p. 965).

Included in evidence and the findings of the trial court which the Supreme Court of Tennessee refused to consider were:

1. That the underpass was part of a state-wide and nation-wide plan to foster commerce by motor vehicle on the public highways;

2. That the decision to build the underpass, its location and construction, was not in any proper sense an exercise of the police power but, rather, as set forth in the bill of complaint, pursuant to a general plan of internal improvement fostered by the Congress of the United States in conjunction with the several States to make a nation-wide system of superhighways in the interest of interstate commerce by motor vehicle, much of which is in active competition with the railroads themselves;

3. That the underpass did not involve an exercise of the police power any more than many other features of this project, such as elimination of curves, grades, et cetera;

The State highways of Tennessee (as distinguished from county and city roads and turnpikes) have their origin in the Federal-aid highway legislation. The aim of that legislation is a "connected system of roads for the whole Na-

tion;" "to provide complete and economical highway transport throughout the Nation"; to furnish "a new means of transportation, no less important to the country as a whole than that offered by the railroads"; to establish "lines of motor traffic in interstate commerce." The immediate interest of the Federal Government is, in part, the national defense, as well as the transportation of the mails;

[fol. 150] 5. The relief of the unemployment incident to the business depression had been the main incentive for highway construction during the period in which the highway there in question was undertaken and completed;

6. Lexington, the city there involved, was a rural community of 1823 inhabitants located in a sparsely settled territory. *The construction of the new highway with the underpass was not designed to meet local transportation needs.* It was undertaken to serve as a link in a nation-wide system of highways. State Highway No. 20, as formerly routed, passed through Lexington on Clifton Street, and crossed the railroad at grade; it was adequate for the existing traffic and that to be expected;

7. That the present facilities were deemed locally both safe and adequate was attested by the fact that neither the city authorities nor anyone else had suggested elimination of that grade crossing; that the grade crossing was to remain unchanged after the new highway was put into use; and that the Clifton Street route was continued to be used for the local traffic;

8. The underpass was required for a new and additional highway over which State Highway No. 20 was being routed, which was to become a part of a Federal-aid route between Nashville and Memphis;

9. The underpass was prescribed, *not upon consideration of local safety needs*, but in conformity with general plans of the Federal and State highway engineers, as being a proper engineering feature in the construction of a nation-wide system of highways for high speed motor vehicle transportation; and because it was the policy of the Federal authorities to make the avoidance of grade crossings a condition of a grant in aid of construction. *The requirement of the underpass, and the payment of the Railway under the 1921 Tennessee Act of one-half the cost of separating the*

grades were results of the Federal-aid legislation. Final payment of Federal aid on this project was conditioned upon commencement of the construction of this underpass. (79 L. ed. pp. 956-961.)

In other words, the underpass there involved was constructed in order to qualify for Federal funds, not to meet local traffic needs.

It is obvious that the *Nashville* case is unique and is no [fol. 151] authority for the contention that the law has now been changed so that railroads cannot be required to pay the cost of eliminating a grade crossing.

As was stated by the Supreme Court of the United States in the *Nashville* case (at p. 964):

> "* * * No case involving like conditions has been found in any of the lower Federal courts; nor, excepting the case here under review, has any such been found among the decisions of the highest courts of any state."

This makes it abundantly clear that the Supreme Court of the United States did not intend that the Nashville case should be considered as reversing the long line of prior cases setting forth the railroads' responsibility in connection with grade separations.

The elimination of a grade crossing when required, not for the purpose of local transportation needs or public safety but for the purpose of qualifying for Federal aid (as was the situation in the Nashville case), is clearly distinguishable from the grade separation involved in the instant proceeding. In the Nashville case we had a grade crossing in a community of 1823 people in a sparsely settled area; here we have a grade crossing in a metropolitan area populated by several million persons. In the Nashville case we had the new interstate highway created, leaving untouched the existing grade crossing. In the instant proceeding we have a situation where local transportation needs require the im- [fol. 152] provement. No new route is being established. The existing grade crossing is being eliminated to remove a dangerous condition, such elimination being necessary in order that the street may safely handle local transportation needs.

In the *Nashville* case the Supreme Court of the United States expressly recognized the principle of law which we here urge. The court stated (at p. 964):

> "'It is also true that state action imposing upon a railroad the cost of eliminating a dangerous grade crossing of an existing street may be valid although it appears that the improvement benefits commercial highway users who make no contribution toward its cost; Chicago, B. & Q. Co. v. Nebraska, 170 U. S. 57, 42 L. ed. 948, 954, 18 S. Ct. 513; Missouri P. R. Co. v. Omaha, 235 U. S. 121, 59 L. ed. 157, 35 S. Ct. 82; that a railroad has no constitutional immunity from having to contribute to the cost of safeguarding a crossing with another railway line, merely because the first railroad was built before the crossing was made; Detroit, F. W. & B. I. R. Co. v. Osborn, 189 U. S. 383, 47 L. ed. 860, 23 S. Ct. 540; Northern P. R. Co. v. Puget Sound & W.H.R. Co., 250 U. S. 332, 63 L. ed 1013, 39 S. Ct. 474, and that the State may, under some circumstances, impose upon a railroad the cost of the grade separation for a new highway. But in every case in which this Court has sustained the imposition, the new highway was an incident of the growth or development of the municipality in which it was located. Northern P. R. Co. v. Minnesota, 208 U. S. 583, 592, 52 L. ed. 630, 634, 28 S. Ct. 341; Cincinnati, I. & W. R. Co. v. Connersville, 218 U. S. 336, 54 L. ed. 1060, 31 S. Ct. 43, 20 Ann. Cas. 1206; Chicago, M. & St. P. R. Co. v. Minneapolis, 232 U. S. 430, 58 L. ed. 671, 34 S. Ct. 400; Erie R. Co. v. Public Utility Comrs., 254 U. S. 394, 409, 65 L. ed. 322, 333, 41 S. Ct. 169, P. U. R. 1921C, 143. Compare Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 554, 58 L. ed. 721, 725, 34 S. Ct. 364. And in every such case the municipality apparently bore the cost of constructing the new highway for which grade separation was required.'"

[fol. 153] It should also be emphasized that the Supreme Court of the United States expressly stated in the *Nashville* case, at page 965:

> "We have no occasion to consider now whether the facts presented by the Railway were of such persua-

siveness as to have required the State court to hold that the statute or order complained of are arbitrary and unreasonable. That determination should, in the first instance, be made by the Supreme Court of the State. (Citing cases.) Moreover, since that court held the facts relied upon to be without legal significance, it did not inquire whether the findings were adequately supported by the evidence introduced in the trial court. The correctness of some of the findings is controverted by the State. Other facts of importance bearing upon the issue may possibly be deductible from the evidence, or be within the judicial knowledge of that court. When the scope of the police power is in question the special knowledge of local conditions possessed by the State tribunals may be of great weight. (Citing cases) * * *"

It is our considered opinion that the *Nashville* case, when properly analyzed, clearly supports the proposition that, in connection with a grade separation such as we are here considering, the railroad can be required to pay the entire cost of the improvement, or such lesser amount as this Commission may deem proper. As was stated by Mr. Chief Justice Hughes in *Chicago, M. & St. P. R. Co.* v. *Minneapolis* (1914), 232 U. S. 430, 58 L. ed. 671, at page 674:

> *"It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings, but also to build and maintain suitable bridges or viaducts to carry highways newly laid out, over their tracks, or to carry their tracks over such highways."* (Emphasis added.)

[fol. 154] *The Decisions of the Commission do not constitute an unlawful or other burden on interstate commerce*

We submit that petitioner's claim that the Commission's order burdens interstate commerce, in violation of the Commerce Clause or the National Transportation Policy is too remote and unrelated to the Los Feliz situation to call for reply herein. Even were such actually existent (which we do not concede) there is no showing of *undue* discrimination, which deficiency, of itself, conclusively refutes such

a claim. Furthermore, there is no claim nor can there be any valid showing that petitioner is not making highly profitable returns from its rail common carrier operations both within and without the State, or that the instant decision as to its Los Feliz crossing would render confiscatory the return of petitioner on its California operations. In view of these latter, it is elementary that the State may require the instant Los Feliz crossing service, said requirement raising no issue under the Federal Constitution. (*Alabama Public Service Commission* v. *Southern Railway Company*, 341 U. S. 341, 347, 352-353, 95 L. ed. 1002, 1007, 1010; *Missouri Pacific Railway Co.* v. *Kansas*, 216 U. S. 262, 277-280, 54 L. ed. 472, 478-480; *Atlantic Coast Line R. Co.* v. *North Carolina*, 206 U. S. 1, 23-27, 51 L. ed. 933, 943-945; *United Fuel Gas Co. v. Railroad Commission*, 278 U. S. 300, 308-309, 73 L. ed. 396). In these cases the Court has [fol. 155] consistently followed the aforesaid rule.

Petitioner does not categorically assert that a State has no authority to burden or regulate interstate commerce, but it might be inferred that such contention is being made by petitioner from the propositions advanced by it. We call to this Court's attention the rule laid down by the Supreme Court of the United States that a State may lawfully *burden* interstate commerce and regulate it so long as State authority does not discriminate against such commerce. (*South Carolina State Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 189, 82 L. ed. 734, 741; *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U. S. 329, 333, 95 L. ed. 993, 998; *Railway Express Agency* v. *New York*, 336 U. S. 106, 111, 93 L. ed. 533, 539; *Kelly* v. *Washington*, 302 U. S. 1, 9-15, 82 L. ed. 3, 10-13; *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179, 186, 95 L. ed. 202.) Any doubt as to Federal superseding State must be resolved in favor of State authority. *Ark. R. R. Com.* v. *C. R. I. & P. R. Co.*, 274 U. S. 597, 603, 71 L. ed. 1224, 1228.

The fact that review in the Alabama Courts is limited to the record taken before the Commission presents no constitutional infirmity. Washington ex rel Oregon R. & N. Co. v. Fairchild, 224 U. S. 510, 56 L. ed. 863, 32 S. Ct. 535 (1912). And, whatever the scope of re-

view of Commission findings when an alleged denial of constitutional rights is in issue, it is now settled that a utility has no right to relitigate factual questions on the ground that constitutional rights are involved. New York v. United States, 331 U. S. 284, [fol. 156] 334-336, 91 L. ed. 1492, 1528-1530, 67 S. Ct. 1207 (1947); Railroad Commission of Texas v. Rowan & Nichols Oil Co., 311 U. S. 570, 576, 85 L. ed. 358, 362, 61 S. Ct. 343 (1941)."

In attempted support of petitioner's contention for trial de novo, it has resorted to a rule heretofore announced in the *Ben Avon* case, *infra*, that a utility is entitled to a judicial determination of both the law and the facts in a regulatory proceeding.

While not of controlling importance so far as this proceeding is concerned, we wish to call to this Court's attention the fact that the Supreme Court has repudiated the rule which it announced in the case of *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U.S. 287, 289, 64 L. ed. 908, 914, with Justices Brandeis, Holmes, and Clark strongly dissenting. As lawyers are generally aware, that rule was of little practical value because courts were not inclined to try regulatory proceedings *de novo*. Particularly this Court, under the limited statutory review existing, could not retry a regulatory proceeding coming from the Commission because the statute requires the review to be determined solely upon the record of the Commission, the statute prohibiting this Court from taking additional evidence. Such a limited review by the courts is constitutional. (*Alabama Public Service Commission* v. *Southern Ry. Co.*, 341 U.S. 341, 348-349, 95 L. ed. 1002, 1008.) Obviously, the rule that a utility is entitled to the determination by a Court on both the law [fol. 157] and the facts is rendered negative where judicial review is limited to the record made before the regulatory body. The philosophy and attitude of this Court was clearly and elaborately stated in the case of *Southern California Edison Co.* v. *Railroad Commission*, 6 Cal. 2d 737, at pages 746-749, and comment thereon is unnecessary. Over the years the Ben Avon rule has been eroded and devitalized by the Courts themselves until the Supreme Court of the United States, in the cases of *Railroad Commission* v. *Rowan &*

Nichols Oil Co., 310 U.S. 573, 581-582, 584, 84 L. ed. 1368, 1373, 1374; Id., 311 U.S. 570, 85 L. ed. 358; *New York* v. *U.S.* 331 U.S. 284, 334-336, 91 L. ed. 1492, 1528-1530; *Alabama Pub. Serv. Commission* v. *Southern Ry. Co.*, 341 U.S. 341, 348, 349, 95 L. ed. 1002, 1008, finally rejected that rule, although the Ben Avon decision was not expressly overruled. A reading of these cases clearly demonstrates the repudiation of the rule. Following is the language of the Supreme Court on this point in the *Alabama Public Service Commission* case, supra:

> "The fact that review in the Alabama Courts is limited to the record taken before the Commission presents no constitutional infirmity. *Washington ex rel. Oregon R. & N. Co.* v. *Fairchild*, 224 U.S. 510, 56 L. ed. 863, 32 S. Ct. 535 (1912). And, whatever the scope of review of Commission findings when an alleged denial of constitutional rights is in issue, it is now settled that a utility has no right to relitigate factual questions on the ground that constitutional rights are involved. *New York* v. *United States*, 331 U.S. 284, 334-336, 91 L. ed. 1492, 1528-1530, 67 S. Ct. 1207 (1947); *Railroad Commission of Texas* v. *Rowan & Nichols Oil Co.*, 311 U.S. 570, 576, [fol. 158] 85 L. ed. 358, 362, 61 S. Ct. 343 (1941)." (*Alabama Public Service Commission, et al.* v. *Southern Railway Company*, 341 U.S. 341, 348-349, 95 L. ed. 1002, 1008.)

In view of the fact that the Supreme Court of the United States—the Court that prescribed the Ben Avon rule—no longer follows said rule, surely there is no reason why this Court should follow it. The fact that the Public Utilities Act was amended in 1933 in formal compliance with the Ben Avon rule could not perpetuate the rule in California after the father of the rule had disowned it.

The Weight of Judicial Decision in the Great Majority of Cases Clearly Supports the Findings, Opinion, and Order of Respondent, Public Utilities Commission.

In the absence of constitutional or valid statutory limitations, the State and its duly authorized political subdivisions have full power and authority, both at common law and under

the Federal Constitution, to require separation of grades at crossings of public streets and highways by railroads and to require the railroads to pay as much as the entire cost thereof and to repair and maintain the separation structures after their construction. This is a proper exercise of police power by or on behalf of the sovereign.

In the case of *Erie Railroad Co.* v. *Board of Public Utility Comrs.* (1920), 254 U.S. 394, 65 L. ed. 322, an order had been made by the Board of Public Utility Commissioners of New Jersey requiring the Erie Railroad to install grade separations at fifteen street crossings in the city of Paterson. [fol. 159] Fourteen of these crossings were required to be made by means of underpassed streets and the fifteenth by means of a viaduct carrying the street over the railroad. The order required the railroad company to pay the entire cost of all these separations, with the exception that 10% of the cost was required to be borne by a streetcar company which occupied three of the crossings. Most of the streets involved were laid out later than the railroad tracks. The railroad company insisted that compliance with the order would result in its bankruptcy and attacked the order on the grounds that it was unreasonable, arbitrary, and a violation of due process and interstate commerce clauses of the Federal constitution. In affirming the order the Supreme Court of the United States, speaking through Mr. Justice Holmes (254 U.S. 410, 65 L. ed. 333), said:

> "Grade crossings call for a necessary adjustment of two conflicting interests,—that of the public using the streets, and that of the railroads and the public using them. Generally the streets represent the more important interest of the two. There can be no doubt that they did when these railroads were laid out, or that the advent of automobiles has given them an additional claim to consideration. They always are the necessity of the whole public, which the railroads, vital as they are, hardly can be called to the same extent. Being places to which the public is invited, and that it necessarily frequents, the state, in the care of which this interest is, and from which, ultimately, the railroads derive their right to occupy the land, has a constitutional right to insist that they shall not be made dangerous to

the public, whatever may be the cost to the parties introducing the danger. This is one of the obvious cases of [fol. 160] the police power; or, to put the same proposition in another form, the authority of the railroads to project their moving masses across thoroughfares must be taken to be subject to the implied limitations that it may be cut down whenever and so far as the safety of the public requires. It is said that if the same requirement were made for the other grade crossings of the road, it would soon be bankrupt. That the states might be so foolish as to kill a goose that lays golden eggs for them has no bearing on their constitutional rights. If it reasonably can be said that safety requires the change, it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil. (Citing cases.) To engage in interstate commerce the railroad must get on to the land; and, to get on to it, must necessarily comply with the conditions imposed by the state for the safety of its citizens. Contracts made by the road are made subject to the possible exercise of the sovereign right. (Citing cases.) If the burdens imposed are so great that the road cannot be run at a profit, it can stop, whatever the misfortunes the stopping may produce. (Citing cases.) Intelligent self-interest should lead to a careful consideration of what the road is able to do without ruin, but this is not a constitutional duty. In the opinion of the courts below the evidence justified the conclusion of the board that the expense would not be ruinous."

In *Chicago, M. & St. P. R. Co.* v. *Minneapolis* (1914), 232 U.S. 430, 58 L. ed. 671, the City of Minneapolis had acquired certain property for park purposes which included two lakes in their entirety and a portion of the shores of a third lake, together with large tracts of land in the vicinity. It proceeded to construct two canals connecting the three lakes, together with walks on either side thereof. The railroad owned a right of way 100 feet wide which crossed the path of one of the proposed canals, and the city sought to condemn an [fol. 161] easement for this canal and its lateral walks across

this right of way. The railway tracks at the point in question were located on an artificial embankment 18 feet above the waterlevel of the lakes. It was agreed that the city should take the land and construct the canal and walks, and that the railway company should build the bridge according to plans prepared by the city, but the railway company reserved its right to recover damages or compensation in the condemnation action and claimed, in addition to the value of the land taken (which was paid), that it should be compensated for the entire cost of the necessary bridge across the canal and such further sum as would be sufficient to maintain the bridge. The judgment in the condemnation case awarded to the railroad only the value of the land taken, together with the cost of certain features of the bridge which were purely ornamental. In affirming the judgment, the Supreme Court of the United States, speaking through Mr. Justice Hughes, said (232 U.S. 437, 58 L. ed. 674):

> "The question thus presented is whether the refusal to allow compensation for the cost of constructing and maintaining the necessary railroad bridge across the gap in the right of way, made by the building of the canal, amounts to a deprivation of property without due process of law.
>
> "*It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings; but also to build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their tracks, or to carry their tracks over such highways . . .*" (Emphasis added.)

[fol. 162] Quoting from a Minnesota case, the court proceeds:

> "'A railroad company receives its charter and franchise subject to the implied right of the state to establish and open such streets and highways over and across its right of way as public convenience and necessity may, from time to time, require. That right on the part of the state attaches by implication of law to the franchise of the railroad company, and imposes upon it an obligation to construct and maintain at its own expense suitable crossings at new streets and highways to the

same extent as required by the rules of the common law at streets and highways in existence when the railroad was constructed.' . . . (Citing cases.)

"Under the doctrine of these decisions, it necessarily follows that if the city of Minneapolis had opened a public road through the embankment of the plaintiff in error, the latter would have had no ground to complain that its constitutional rights had been violated because it was compelled to bridge the gap at its own cost. No different rule could be applied because the highway was laid out in order to increase the advantages of a public park. In this aspect, it would be equally a crossing devoted to the public use (citing cases); and we see no basis for a distinction in principle in the case of an intersecting public road opened under competent authority because such a highway might lead to public recreation grounds instead of to places of business, or might connect lakes instead of avenues."

In *Missouri Pacific R. Co.* v. *Omaha* (1914), 235 U.S. 121, 59 L. ed. 157, the city of Omaha by ordinance required the railroad to construct a viaduct over its line at its intersection with Dodge Street, together with approaches thereto along the southerly line of Dodge Street, leaving the northerly side of the street open to public traffic. The ordinance required construction of the viaduct in accordance with plans and specifications prepared by the city engineer. The railroad [fol. 163] brought this action in the federal courts. The Circuit Court (which was then the federal court of original jurisdiction) dismissed the bill and this decree was affirmed both by the Circuit Court of Appeals and the Supreme Court of the United States. The latter court, speaking through Mr. Justice Day, said (235 U.S. 127, 59 L. ed. 160):

"That a railroad company may be required by the state, or by a duly authorized municipality acting under its authority, to construct overhead crossings or viaducts at its own expense, and that the consequent cost to the company as a matter of law is *damnum absque injuria*, or deemed to be compensated by the public benefit which the company is supposed to share, is well settled by prior adjudications of this court. (Citing cases.)

"This is done in the exercise of the police power, and the means to be employed to promote the public safety are primarily in the judgment branch of the government, to whose authority such matters are committed, and so long as the means have a substantial relation to the purpose to be accomplished, and there is no arbitrary interference with private rights, the courts cannot interfere with the exercise of the power by enjoining regulations made in the interest of public safety which the legislature has duly enacted. (Citing cases.)"

In *Lehigh Valley R. Co.* v. *Board of Public Utility Comrs.* (1928), 278 U.S. 24, 73 L. ed. 161, the railroad sought to enjoin enforcement of an order made by the Board of Public Utility Commissioners of New Jersey requiring the railroad to eliminate two railroad grade crossings and to substitute in their place a single overhead crossing at the *sole expense of the railway company in the amount of* $324,000. In ad- [fol. 164] dition to raising the usual constitutional objections, the railroad claimed that an adequate crossing could be built for at least $100,000 less than the amount it was required to expend under the order and also claimed that the order unconstitutionally imposed a direct burden on interstate commerce and violated the interstate commerce law in that the required expenditures exceeded the legal duties of the railroad and the reasonable requirements of public safety and convenience. The case was instituted in the United States District Court and was heard by a three-judge court which dismissed the bill. On appeal, the Supreme Court affirmed the decree of dismissal and, speaking through Mr. Chief Justice Taft, said (278 U.S. 33, 73 L. ed. 166):

"This highway is not infrequently crowded with vehicles. When route No. 29 is completed, it will certainly be more crowded. The immediate prospect of using new route 29 makes greater room in the roadways most desirable. The large expenditure to secure such advantages does not seem to be arbitrary or wasteful when made for two busy highways instead of one.

"It is not for the court to cut down such expenditures merely because more economical ways suggest themselves. The board has the discretion to fix the cost,

The function of the court is to determine whether the outlay involved in the order of the board is extravagant in the light of all the circumstances, in view of the importance of the crossing, of the danger to be avoided, of the probable permanence of the improvement and of the prospect of enlarged capacity to be required in the near future and other considerations similarly relevant.

* * * * * * *

[fol. 165] "A railroad company in maintaining a path of travel and transportation across a state with frequent trains of rapidity and great momentum, must resort to reasonable precaution to avoid danger to the public. This court has said that where railroad companies occupy lands in the state for use in commerce, the state has a constitutional right to insist that a highway crossing shall not be dangerous to the public, and that where reasonable safety of the public requires abolition of grade crossings, the railroad can not prevent the exercise of the police power to this end by the excuse that such change would interfere with interstate commerce or lead to the bankruptcy of the railroad. (Citing cases.) This is not to be construed as meaning that danger to the public will justify great expenditures unreasonably burdening the railroad, when less expenditure can reasonably accomplish the object of the improvements and avoid the danger. If the danger is clear, reasonable care must be taken to eliminate it and the police power may be exerted to that end. But it becomes the duty of the court, where the cost is questioned, to determine whether it is within reasonable limits. (278 U. S. 34, 73 L. ed. 167.)

* * * * * * *

"The care of grade crossings is peculiarly within the police power of the states (citing cases), and if it is seriously contended that the cost of this grade crossing is such as to interfere with or impair economical management of the railroad, this should be made clear. It was certainly not intended by the Transportation Act

to take from the states or to thrust upon the Interstate Commerce Commission investigation into parochial matters like this, unless by reason of their effect on economical management and service, their general bearing is clear." (278 U. S. 35, 73 L. ed. 167.)

So zealously have the courts guarded the police power of the states and their political subdivisions with respect to railway crossings of highways that they have held in [fol. 166] numerous cases where municipalities have by contract agreed with railway companies to pay the expense of maintenance and repair of grade separation structures after their construction, that such contracts are void as against public policy since they constitute the virtual abdication of sovereign powers, it being said in such cases that the "police power cannot be contracted away." See for examples *Chicago M. & St. P. R. Co.* v. *Minneapolis* (1914), 232 U. S. 430, 58 L. ed. 671, and *Northern Pacific R. Co.* v. *Minnesota ex rel. Duluth* (1907), 208 U. S. 583, 52 L. ed. 630. In the latter case the court, speaking through Mr. Justice Day, said (208 U. S. 596, 52 L. ed. 636):

> "There can be no question as to the attitude of this court upon this question as it has been uniformly held that the right to exercise the police power is a continuing one, that it cannot be contracted away, and that a requirement that a company or individual comply with police regulations without compensation is the legitimate exercise of the power, and not in violation of the constitutional inhibition against the impairment of the obligation of contracts. (Citing cases.) * * * We find no error in the judgment of the Supreme Court of Minnesota holding the contract to be void and beyond the power of the city to make, and it will, therefore, be affirmed."

In *State ex rel. Alton R. Co.* v. *Public Service Commission* (Mo. 1934), 70 S. W. 2d 57, 60, the Supreme Court of Missouri, in upholding an order of the Public Service Commission authorizing the widening of a concrete viaduct over a railroad, said:

> [fol. 167] "The state has the right to build its other public highways, for travel by other means, over,

across, or under the railroad. To accommodate such travel, it has the right to build new roads across railroads at new places and provide for the necessary kind of crossing, or to widen existing roads and alter such crossings already established, as the public interest may in either case reasonably require. *If it did not, it would no longer be the sovereign.* To exercise its police power for the preservation of the public safety, this state has through the Legislature designated the Public Service Commission as the exclusive agency to determine and prescribe the manner and point of new crossings and to alter or abolish established crossings, apportion the expense, either of making new crossings or alterations of existing ones, and to provide for their maintenance.

"'*Salus populi supreme lex est*' is the fundamental principle of the police power of the state, as well as our state motto. Private corporations, accorded the privilege of operating railroads, declared to be public highways of the state, for the purpose of private profit, must pay a reasonable proportion of the cost of improvements, which the presence of their tracks make or contribute to make necessary, for the welfare and safety of the people of the state. We therefore hold that the Public Service Commission has the authority not only to provide for a separation of a grade between a public highway and a railroad, when conditions make that necessary and proper, but that it also has the power, whenever the manner of crossing formerly prescribed by it becomes inadequate in width, height, or strength, to reasonably provide for the safety and welfare of the traveling public thereon, to order it reconstructed to meet their reasonable needs." (Emphasis added.)

A review of the decisions of the respondent Public Utilities Commission and its predecessor Railroad Commission of California will show that throughout their history they have uniformly recognized the principle that [fol. 168] this State has the right and the power to impose upon a railroad all or any part of the cost of grade separations, including their alteration, relocation, or abolishment,

Petitioner has stated that the Commission has adopted the so-called benefit theory as a proper basis for the apportionment of costs, but the decisions cited by it do not support such contention.

The *Goshen Junction* case, 38 C. R. C. 380 (1933) involved a state highway to be paid in part with Federal-aid funds for highway construction, in the course of which the Commission took cognizance of the then existing depression and expressly gave consideration to "the economic situation, particularly at this time when revenues from practically all sources are materially below what they have been in the immediate past." Said facts are borne out by the respondent Commission, Decision No. 25069 of August 15, 1932, reported in 37 C. R. C. 784, 786-787, as hereinbefore cited, and in which it specifically repudiated the so-called "benefits theory" of apportioning grade separation improvement costs in these words:

> "The matter of direct financial benefits is not the sole test of the determination of the respective portions which the railroad and public should contribute toward the cost of such improvement. In apportioning the costs of constructing these separations between applicant and the railroad company, due consideration should be given to the obligations of each party, as well as the benefits derived. *It should be recognized that the railroad has a continual obligation to partici-*
> [fol. 169] *pate in the matter of constructing and maintaining reasonable and adequate crossings over its tracks, both at grade and at separated grades. This obligation is inherent, notwithstanding the fact that the traffic on the railroad may increase or decrease.*" (Emphasis added.)

Other citations of the kind by petitioner appear so widely different, factually speaking, as not to require detailed analysis herein.

Decisions of the Public Utilities Commission Carry a Strong Presumption of Validity

It is respectfully submitted that this Honorable Court, in weighing petitioner's contentions of unconstitutionality, will keep ever in mind that the decisions assailed are sup-

ported by a strong presumption of validity. (*St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 53, 80 L. ed. 1033, 1042; *Market St. Ry. Co. v. Railroad Commission*, 24 Cal. 2d 378, 399, *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, 602, 88 L. ed. 333, 345; *San Francisco v. Industrial Accident Commission*, 183 Cal. 273.)

Decisions Nos. 47421 and 47597 of the Public Utilities Commission Have the Same Force and Effect as a Statute Enacted by the Legislature

The public Utilities Commission is a constitutional body to which has been delegated legislative authority, and its decisions in the execution of such legislative authority have [fol. 170] the same force and effect as a statute enacted by the Legislature. All the presumptions of validity which surround a statute enacted by the Legislature, based upon an exertion of the police power, support the decisions herein. The test of constitutionality applicable to a statute applies equally to the constitutionality of the decision involved herein. (*Pacific States Box & Basket Co. v. White*, 296 U. S. 176, 185-186, 80 L. ed. 138, 146; *Thompson v. Consolidated Gas Utilities Corp.*, 300 U. S. 55, 69, 81 L. ed. 510, 518; *Lewis v. Potomac Elec. Pr. Co.* (U. S. Ct. of Appeals, D. C.), 64 F. 2d 701, 702.)

The United States Supreme Court in the case of *Pacific States Box & Basket Co. v. White*, supra, 296 U. S. 176, 185-186, 80 L. ed. 138, 146, discussed the rule as follows:

> "• • • The order here in question deals with a subject clearly within the scope of the police power. See *Turner v. Maryland*, 107 U. S. 38, 27 L. ed. 370, 2 S. Ct. 44. When such legislative action 'is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary.' *Borden's Farm Products Co. v. Baldwin*, 293 U. S. 194, 209, 79 L. ed. 281, 288, 55 S. Ct. 187.
>
> • • • • • • •

"It is urged that this rebuttable presumption of the existence of a state of facts sufficient to justify the exertion of the police power attaches only to acts of legis- [fol. 171] lature; and that where the regulation is the act of an administrative body, no such presumption exists, so that the burden of proving the justifying facts is upon him who seeks to sustain the validity of the regulation. The contention is without support in authority or reason, and rests upon misconception. Every exertion of the police power, either by the legislature or by an administrative body, is an exercise of delegated power. Where it is by a statute, the legislature has acted under power delegated to it through the Constitution. Where the regulation is by an order of an administrative body, that body acts under a delegation from the legislature. The question of law may, of course, always be raised whether the legislature had power to delegate the authority exercised. Compare *Panama Ref. Co.* v. *Ryan*, 293 U. S. 388, 79 L. ed. 446, 55 S. Ct. 241, and *A. L. A. Schlechter Poultry Corp.* v. *United States*, 295 U. S. 495, 79 L. ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947. But where the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies. Compare *Aetna Ins. Co.* v. *Hyde*, 275 U. S. 440, 447, 72 L. ed. 357, 364, 48 S. Ct. 174."

This Court May Not Substitute Its Judgment for That of the Public Utilities Commission

Petitioner has cited numerous decisions from other jurisdictions calculated to create the inference, at least, that courts will substitute their judgment for the judgment of the regulatory body. Whether some States follow such a rule has no application here for the reason that the decisions of this Court and the plain provision of Sections 1756-1760 of the Public Utilities Code compel the conclusion that [fol. 172] this Court has no authority to substitute its judgment for the judgment of the Commission. (*Southern Cali-*

fornia Edison Co. v. *Railroad Commission*, 6 Cal. 2d 737, 746-749.)

Furthermore, the Supreme Court of the United States has held in an unbroken line of decisions that Courts must not substitute their judgment for that of regulatory bodies. (*St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 31, 80 L. ed. 1033, 1041; *Railroad Commission of Texas, et al.* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, 581, 582, 84 L. ed. 1368, 1373, 1374, pointing out that a Court must not substitute its judgment for that of the regulatory body *even though the evidence is convincing that the judgment of the Court is better than the result arrived at by the regulatory body.* (*Railroad Commission of Texas* v. *Rowan & Nichols Oil Co.*, 311 U. S. 570, 85 L. ed. 358; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 596-597, 85 L. ed. 368, 377-378.)

This rule is not altered or varied, *even though the facts are not in dispute.* Such a state of the record makes no difference. (*Gray* v. *Powell*, 314 U. S. 402, 412, 86 L. ed. 301, 310.)

Mr. Justice Holmes, speaking for the Supreme Court of the United States, stated the rule very succinctly as follows:

> "It is enough if we cannot say that it was *impossible* for a fair-minded board to come to the result which was reached." (Emphasis added.) (*San Diego Land* [fol. 173] *& Town Co.* v. *Jasper*, 189 U. S. 439, 441-442, 47 L. ed. 892, 894.)

The Jurisdiction and the Authority of the Public Utilities Commission Is Plenary and Exclusive

We have already stated briefly supporting authority for Commission action and that by Article XII, Sections 17, 19, 20, 21, 22, 23, and 23a of the Constitution of the State of California, and the Public Utilities Act (Stats. 1915, Ch. 91, as amended—now Public Utilities Code) the Public Utilities Commission is given plenary and exclusive authority over public utilities in this State. (For Article XII, Secs. 22 and 23, see pages 13 and 14 hereof.) The equivalent provision is contained in Section 23a of said Article XII.

The Legislature may confer on the Commission any and all authority it possesses over public utilities and, in addition, it may confer powers upon the Commission that the Legislature itself could not exercise because of constitutional restriction imposed directly upon the Legislature. The only restraint imposed upon the Legislature in conferring powers upon the Commission pursuant to said Article XII is that afforded by the Federal Constitution.

The foregoing constitutional provisions and the Public Utilities Act have received interpretation at the hands of this Court, and the plenary authority conferred thereby on [fol. 174] this Commission has been broadly upheld. (*Pacific Tel. & Tel. Co.* v. *Eshleman*, 166 Cal. 640, 650, 689; *Clemmons* v. *Railroad Commission*, 173 Cal. 254, 258; *City of San Jose* v. *Railroad Commission*, 175 Cal. 284, 290; *Miller* v. *Railroad Commission*, 9 Cal. 2d 190, 195, 198; *Sale* v. *Railroad Commission*, 15 Cal. 2d 612, 617.)

In *Sale* v. *Railroad Commission, supra*, this Court stated at pages 617 and 618 as follows:

> "* * * A court is a passive forum for adjusting disputes, and has no power either to investigate facts or to initiate proceedings. Litigants themselves largely determine the scope of the inquiry and the data upon which the judicial judgment is based.
>
> "The powers and functions of the Railroad Commission are vastly different in character. It is an active instrument of government charged with the duty of supervising and regulating public utility services and rates. (Cal. Const., art. XII, secs. 22, 23.) The Constitution gives the legislature full authority to implement the commission's powers with legislation germane to public utility regulation, and under this authority the legislature has departed from traditional techniques of judicial procedure. The commission has the right and duty to make its own investigations of fact, to initiate its own proceedings and in a large measure to control the scope and method of its inquiries. (See Public Utilities Act, *supra*, passim; 15 Cal. L. Rev. 445.) All hearings, investigations and proceedings are governed by the provisions of the act and by rules of practice and procedure adopted by the commission. 'No

informality . . . shall invalidate any order, decision, rule or regulation made . . . ' (Public Utilities Act, *supra*, sec. 53.) *Hence, unless the act required the commission to proceed in a certain way, the only limitation upon its procedural powers is its duty to provide a fair hearing to any party whose constitutional rights may be affected by a proposed order.*" (Emphasis added.)

[fol. 175] The Constitutionality of a Statute Will Only Be Passed Upon Where Absolutely Necessary

It is a well established general rule that the constitutionality of a statute will be passed on only if, and to the extent that, it is directly and necessarily involved in a justiciable controversy and is essential to the protection of the rights of the parties concerned. Such determination must be absolutely necessary in order to determine the merits of the case in which the constitutionality of the statute has been drawn into question. This is such a basic and well established rule of this Court and of the United States Supreme Court that but a few of the leading decisions are cited herein: *State of Texas* v. *Interstate Commerce Commission*, 258 U. S. 158, 66. L. ed. 531; *Arkansas Fuel Oil Co.* v. *State of Louisiana*, 304 U. S. 197, 82 L. ed. 1287; *Franklin* v. *Peterson*, 87 C.A. 2d 727, 730; *Great Western Power Co.* v. *City of Oakland*, 189 Cal. 649; *In re Herman*, 183, Cal. 153, 160, 16 Corpus Juris Secondum 207, Sec. 94.

Petitioner, Through Its Wholly Owned Pacific Motor Trucking Company—Pacific Motor Transport, and Its Subsidiaries, Pacific Electric Railway System, Railway Express Agency, Inc., and Others, Operates and/or Controls the Largest and Most Extensive Common Carrier Railroad-motor Truck-passenger Bus Stage-express and Related Services in the State of California, in the Course of Its Extension of Operations to the Customers' Doorway, Hence Has Greater Concern in the Public Highways of This State Than Any Other Carrier of the Entire Industry

One of the complaints of petitioner, Southern Pacific, to [fol. 176] this Honorable Court is that the Public Utilities

Commission, in its orders (Decisions Nos. 47420 and 47597) directing the grade separation at its Los Feliz crossing, is somehow forcing it to subsidize its competitors (p. 52 of Petition), owing to the increased highway usage by the motor vehicle industry of California and, as an attempted justification therefor, we quote petitioner:

> "The evidence shows that greater freedom of movement of highway traffic—that is, elimination of vehicular delay upon a major traffic artery—will result from the separation, and is the real and only purpose thereof. Petitioner cannot benefit in any way from this result; indeed, to the extent that competitive traffic (including that moving in private automobiles) using Los Feliz or other affected roadways is enabled by this improved facility to move faster or more cheaply, petitioner is damaged instead of benefited."

Strange logic, indeed, to come from one of the most extensive and intensive highway users throughout the entire State!

We reiterate that this petitioner's contention for a "monetary-profits-or-nothing" participation in necessary grade separations at its vital rail-highway intersections is preposterous: For example, blinded by its unreasonable demands for instantaneous mathematical calculable monetary profits and benefits, petitioner has flatly refused to give consideration to numerous of the obvious benefits and advantages that inevitably accrue from the widely-petitioned grade separation at the dangerous Los Feliz crossing, to-wit:

[fol. 177 1. Increasing posibility of accidents due to backlash in the railroad tracks (Tr. p. 316—loss and damage claims);

2. Savings resulting from relief from crossing gates, including certain switching operations (Tr. p. 317);

3. Improved drainage of right of way in vicinity of Los Feliz and reduction of flood conditions at depot grounds;

4. Greater accessibility of railroad depot to patrons coming from the Hollywood area to the Glendale Station of petitioner;

5. Elimination of delay to railroad through elimination of crossing accidents, loss of life, and personal injury suits;

6. Elimination of the possibility of serious damage to railroad equipment by elimination of accidents—the type of accident which could occur but which has not yet occurred at Los Feliz (Tr. p. 347);

7. Increased length of trains over the present 90 to 100 cars;

8. Greater freedom, if not profits, in all switching operations;

9. Opportunity for temporary storage of trains up to 90 cars in length;

10. Advantages of new structures and consequent longer life periods;

11. Benefits from streets as "feeders" for this petitioner;

12. Benefits from improved good will which, though conceded to be important, admittedly is difficult of precise monetary evaluation.

And, by way of contrast to petitioner's attitude, we have undertaken to explain to the Court this Commission's uniform practice, in apportioning cost allocations between applicants and the railroads, of giving in all instances due consideration to the obligations of each of the parties, to-[fol. 178] gether with the benefits and advantages to be derived by such parties.

For, as heretofore stated by the Commission, it should be recognized that the railroad has a continuing obligation to participate in the matter of constructing and maintaining reasonable and adequate crossings over its tracks, both at grade and at separate grades. We wish to emphasize that this obligation is inherent. (*City of Oakland* v. *Schenck*, 197 Cal. 456; 241 P. 545.)

Petitioner, in Its "Briefing for Volume" Rather Than Logic, Has Gone Completely Outside the Instant Record and Otherwise Violated the Governing Rules and Ethics Involved

The instant issues are indeed simple, but petitioner has injected extraneous matters to lend complexity and confuse the record. In doing so it has gone far afield in utter disregard of the record herein and resorted to borrowing

outside railroad propaganda in a frantic effort to bolster its untenable position herein.

For example, on pages 34 and 74 of the petition, reference is made to a study prepared by the Stanford Research Institute. No such study was in evidence herein. Likewise, on page 36 reference is made to a General Administrative Memorandum No. 325 issued by the United States Bureau of Public Roads, a document which, also, was not in evidence in these proceedings.

[fol. 179] On page 37, the petition reads:

> "It is suggested that the Commission made its findings in the face of this positive testimony, in order to avoid any possibility that the State Department of Public Works might be called upon to contribute; since in that event, Federal funds being potentially involved, the contribution to the railroad might have to be limited to 10 per cent of the allocable cost."

We submit, Your Honors, that the inference in such language is wholly improper, to say the least, and merits the rightful indignation of the Public Utilities Commission.

Again, the petition refers to the history of accidents at the crossing in question and, by noting the relatively few accidents over the last 25 years, implies that the crossing, as such, is not potentially dangerous. This we regard as an improper implication.

And again, the petition suggests that the Commission is somehow inconsistent in adopting the "continuing obligation" theory while at the same time recognizing a "safety" aspect. In answer to this, we respectfully reaffirm that there is no inconsistency in such approach.

Finally, these aforesaid and kindred departures and violations are flagrantly repeated in pages 34 to 37, 65 to 70, and 74 to 82, inclusive, of the instant petition, only to be followed by more of the same (being nowhere in evidence in the official transcript of record) in pages 63 to 71, inclusive, and 98 and 99 of the ensuing appendix to the said petition. [fol. 180] Accordingly, we must ask that this Honorable Court refuse to consider any and all of the above unauthorized data and that it take such further action respecting the

indicated violations of established procedural rules and ethical standards as it deems appropriate.

Summary

Summarized, it is conceded that the instant grade separation is entirely practicable of construction as ordered and we believe the record conclusively establishes the overburdened and hazardous character of the Los Feliz crossing which has already reached its capacity and, as disclosed by various recent checks, continues with still greater train, vehicular, and pedestrian movements (Exs. Nos. 1 to 9) aggravating the congestion, increasing the delays, and otherwise inconveniencing the general public.

That due to its long-standing "top-priority" status, statewide attention has focused upon Los Feliz in the public's demand for relief. That while the underpass (the cheapest of the three alternative plans studied) was finally adopted herein, under the governing law it is immaterial whether the crossing is at grade or below or above the tracks. (*Cincinnati etc. R. Co.* v. *Connersville*, 218 U.S. 336, 54 L. ed. 1060; *Mo. P. R. Co.* v. *Omaha*, 235 U.S. 121, 59 L. ed. 157.) [fol. 181] That the over-all practicalities of the agreed underpass are unquestioned; its construction cost not in issue, the only controversy being as to specific cost allocations as between the several parties with their differing formulae, all of which have been resolved through public hearings and evidence thus adduced.

That pursuant to existing constitutional and statutory mandates (the powers conferred and the duties therein prescribed) the Public Utilities Commission has, in keeping with legislative directives, invoked the police power of the State on behalf of the public interest in promotion of the public safety, welfare, convenience and necessity here involved. In so doing, it has acted pursuant to and in accordance with its said powers and duties, and pursuant to and in full accordance with the applicable provisions of law.

That the Public Utilities Commission has the specific duties of investigation and determination as to the Los Feliz crossing and the exclusive power and authority to allocate costs of such grade separations, and that its findings, opinion, conclusions and orders herein assailed by Southern Pa-

cific are in strict accord with the decisions and procedure of this Court. The aforementioned constitutional and statutory provisions have received interpretation at the hands of this Court, and the plenary authority conferred thereby has been broadly upheld.

That said prevailing State and Federal law for the ef- [fol. 182] fecting of grade crossing separations under the invocation of the police power of this State through the agency of the Public Utilties Commission has not changed, as petitioner has erroneously asserted, but, on the contrary, the great weight of judicial decision fully supports the character and the extent of the determination as herein made.

That petitioner has rested its opposing contentions on but a single case—the *Nashville* case—which, as already shown herein, is wholly dissimilar both as to the governing facts and the applicable law, hence affords no parallel to the instant Los Feliz situation, since in the former case [Nashville] the two separate highways and the two widely separated crossings there involved, being a quarter of a mile or more apart) are separately operated today, just as heretofore.

That as regards legislative or other "trends" urged by petitioner (including the inapplicable so-called Federal-Aid Highway Act), we quote our co-respondents herein, the cities of Los Angeles and Glendale, as follows:

> "Petitioner has argued that the trend nationally is toward allocating costs of grade separation on the basis of benefits. It would probably be more accurate to say that in recent years the railroads have successfully secured passage of legislation by more and more states relieving them of their legal obligation to provide grade crossings." (Respondents Joint Brief, pp. 35-40, at p. 40.)

That the leading cases prior to, during, and since the [fol. 183] so-called "Nashville" case support the controlling principles of law whereby a railroad company takes its charter subject to the power of the State to provide for the safety of the public, and tracks of the railroad are laid subject to the condition, necessarily implied, that their use could be so regulated by competent authority as to ensure said public safety, welfare, convenience and necessity.

Also, that such railroad, when thus accepting privileges and franchises granted in its charter, must be deemed to have taken into account expenses which might thereafter be incurred by reason of an order of the Public Utilities Commission compelling the necessary installations for its safe operation at public highway crossings. (*Pennsylvania-Reading Seashore Lines* v. *Board of Public Utility Commissioners, Department of Public Utilities, et al.* (1951), 81 A (2d) 28, 33; affirmed in 82 A (2d) 774.)

That petitioner is highly inconsistent in disclaiming numerous benefits and advantages which, as hereinbefore enumerated, inevitably would accrue to it and to its highway-carrier subsidiaries from the Los Feliz improvement.

That one of the obvious purposes of petitioner's attack upon the existing laws and the Constitution of California, including the Commission's orders, is to so "stymie", through prolonged and futile negotiations, any and all future grade separation relief and thereby escape any monetary or other payments whatsoever.

[fol. 184] *Conclusion*

Mindful of the history of Commission grade separation procedures, it is doubly apparent that petitioner's rail profits theory here urged upon this Court would be a perversion of grade crossing regulation as it exists in California and would make the present constitutional and statutory provisions for the protection of the public interest under the exercise of the police powers of the State nothing but a sham and a delusion.

Procedurally speaking, the instant situation as urged by petitioner is well characterized by this Court in the case of *American Toll Bridge Co.* v. *Railroad Commission*, 12 C. 2d 184, 207:

> " . . . Nothing appears which justifies a conclusion that all the essentials of a full and fair hearing before the Railroad Commission [Public Utilities Commission] were not accorded the petitioner in compliance with the requirements of the constitutional mandate."
>
> * * * * * * *
>
> " . . . We conclude that the procedure followed in the present matter has not infringed upon the rights of

the petitioner vouchsafed to it by the state and federal constitutions."

And in *Southern California Edison Co.* v. *Railroad Commission*, 6 C. 2d 737, 748, the Court, in denying such a rehearing as here sought by petitioner, commented as follows:

> "There is another field of extensive scope in which the respondent commission exercises its powers and wherein the action of the commission is brought into [fol. 185] question before this court. In this field are the executive and administrative orders of the commission in connection with which the commission exercises a wide discretionary power, such as in the granting, withholding and canceling of permits and countless other orders of regulation and control. Within this classification it quite often happens that the complaining party seeks redress in this court on alleged federal constitutional grounds, when in fact there is no such question substantially involved. In such cases it may not be successfully contended that this court, on a review proceeding involving the action of the commission, should be a trier of disputed questions of fact, already resolved by the commission."

Surely, no public utility has a right to relitigate in the courts, on the ground that constitutional rights are involved, factual questions such as herein determined by the Public Utilities Commission.

The very recent decision of the Supreme Court of the State of California in the related case of the Atchison, Topeka and Santa Fe Railway Company v. Public Utilities Commission of the State of California and City of Los Angeles, S. F. No. 18671, decided December 11, 1952, would appear to dispose of the issues herein.

Since the preparation of this answering brief, this Honorable Court, on December 11, 1952, in S.F. No. 18671 (*The Atchison, Topeka and Santa Fe Railway Company* v. *The Public Utilities Commission of the State of California and City of Los Angeles*), denied a petition for a writ of review [fols. 186-192] which decision, we believe, also disposes of

the issues in the instant proceeding since, as will be noted on page 15 of this answering brief, the Commission affirmed in said instant Decisions Nos. 47420 and 47597 herein its previous holding in Decision No. 47344 involved in S.F. No. 18671 (*The A.T. & S.F.R. Co.* v. *P.U. Com., et al.*—the Washington Boulevard case, supra.)

Considering the fact that the said petitions in each case stress factual similarity with like citations in support of identical contentions, neither petitioner can therefore consistently urge any different ruling herein by the Supreme Court.

Petitioner's mere inference that Decision No. 47420 is unlawful because of its provision that "the effective date of this order shall be twenty (20) days after the date hereof," when no injury to any party is either claimed or shown, is of no significance herein. (*Re Bray on Habeas Corpus*, 125 Cal. App. 363; *Clemmons* v. *Railroad Commission*, 173 Cal. 254.)

Manifestly, the instant petition lacks merit and, for each of the reasons hereinbefore explained, we respectfully urge that said petition be denied.

Respectfully submitted, (S.) Everett C. McKeage, Hal. F. Wiggins, Attorneys for Public Utilities Commission of the State of California.

Dated: San Francisco, California, December 16, 1952.

[fol. 193] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

[Title omitted]

ANSWER AND BRIEF OF THE CITY OF LOS ANGELES AND THE CITY OF GLENDALE, REAL PARTIES IN INTEREST, IN OPPOSITION TO ISSUANCE OF WRIT OF REVIEW—Filed October 8, 1952

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the State of California:

Pursuant to Rule 58(b) of the Rules on Appeal, the City of Los Angeles and the City of Glendale, real parties in

interest in the above-entitled matter, hereby file their answer and brief in opposition to the issuance of writ of review in this cause.

Answer

The City of Los Angeles, a municipal corporation, and the City of Glendale, a municipal corporation, real parties in interest, answering petitioner's Petition for Writ of Review, admit, deny and allege as follows:

I

Answering paragraph IV, these real parties in interest deny that the Commission failed to regularly pursue its lawful authority, or that it acted in excess of its jurisdiction, or that it wrongfully deprived petitioner of rights or property without due process of law, or that it has denied [fol. 194] the petitioner the equal protection of the laws in violation of the Constitution of the United States or of this State, or that it has taken action which results in undue burdens upon interstate commerce.

Further answering said paragraph, these real parties in interest allege that in all particulars and at all times the Commission acted pursuant to and in accordance with its powers and duties, and pursuant to and in accordance with applicable provisions of law.

Further answering said paragraph, which contains conclusions of law, argument, opinion, and assumptions of ultimate facts, these real parties in interest incorporate by reference the matters set forth in their brief.

Wherefore, these real parties in interest respectfully pray:

1. That no writ of review be issued by this Honorable Court in this proceeding.

2. For their costs herein.

3. For such other and further relief as may be proper and just in the premises.

Ray L. Chesebro, City Attorney; Bourke Jones, Assistant City Attorney; Roger Arnebergh, Assistant City Attorney, Attorneys for the City of Los Angeles, a Real Party in Interest. Henry Mc-

Clerman, City Attorney; John H. Lauten, Assistant City Attorney, Attorneys for the City of Glendale, a Real Party in Interest.

[fol. 195] Brief in Opposition to Issuance of Writ of Review

Statement of Case

On May 7, 1951, the City of Glendale filed an application, numbered 32385, with the Public Utilities Commission of the State of California for an order authorizing and requiring the construction of a grade separation of the crossing of Los Feliz Road and the railroad of the Southern Pacific Company, designating the portions of the work to be done respectively by said City of Glendale, the City of Los Angeles, and said railroad corporation, and allocating the cost thereof among said cities and said railroad corporation.

On September 25, 1951, the Commission, on its own motion, instituted an investigation, Case No. 5327, as to the [fol. 196] necessity of effecting the same grade separation and the division of cost among the Cities of Los Angeles and Glendale, the County of Los Angeles and the Department of Public Works, Division of Highways, State of California.

The City of Glendale's application and the Commission's investigation were consolidated for the purpose of hearing and consideration. After public hearings were held on October 3, November 1 and November 29, 1951, the Commission under date of June 30, 1952, issued its Decision No. 43374 authorizing the construction of a grade separation and allocating the total estimated cost of $1,493,200; 50% to the Southern Pacific Company, 25% to the County of Los Angeles, and 12½% each to the Cities of Los Angeles and Glendale.

On July 9, 1952, the Southern Pacific Company petitioned for rehearing. On August 19, 1952, the Commission rendered its Decision No. 47597 denying the petition.

Basic Contentions of Parties

Throughout the proceedings, the Cities of Los Angeles and Glendale have contended that the Railroad should be required to pay that portion of the total cost which is attributable to the presence of the railroad tracks; that the proper basis of apportionment of the total costs is to assign to the Railroad the amount by which the presence of the railroad increases the cost of the necessary street improvement; and that the cost to the Cities of maintain- [fol. 197] ing and improving their city streets should not be increased by reason of the presence of railroads running upon or across them.

The Railroad has contended that costs should be allocated according to benefits received by it and that the only benefits derived by it are from reduced accident damages payable by the Railroad and reduced operating costs brought about by elimination of gatemen and crossing maintenance costs. The Railroad has contended that the evidence does not disclose that the public safety requires the proposed separation, or that the railroad has created or contributed to a situation wherein the convenience and necessity of the public are adversely affected, and therefore the orders of the Commission constitute an improper use of the police power. On the other hand, the Cities contend that the evidence before the Commission clearly shows that public safety requires the grade separation and that the railroad has created or contributed to a situation wherein the convenience and necessity of the public are adversely affected, thus justifying the Commission's orders as a proper exercise of the police power.

Evidence

The evidence as summarized by petitioner in its brief is quite comprehensive; however, certain additional evidence should be noted, and other evidence emphasized.

In 1923, when the movement for a grade separation was first started, the traffic on Los Feliz was 16,000 vehicles per day at the grade crossing. [Ex. 2, p. 4.] Traffic counts [fol. 198] conducted in 1951 indicated that the traffic load had increased to aproximately 27,000 vehicles per day. [Ex. 2, p. 4.] Of the total number of vehicles passing over

the grade crossing, only a very small percentage were trucks and those trucks were engaged principally in local transportation. [Tr. 28, 126.] The buses which used the street were substantially all engaged in local transportation. [Tr. 125.] There was no evidence that vehicles using the street were in competition with the railroad, while there was evidence to the effect that many vehicles using the street were providing business for the railroad. [Tr. 66.] Testimony presented indicated that the public probably would continue to make increasing use of Los Feliz in the future despite construction of freeways in the metropolitan area. [Tr. 185.] Los Feliz is an important traffic artery connecting the Hollywood and West Los Angeles areas with the Glendale, La Crescenta Valley, Pasadena and San Gabriel Valley areas. [Ex. 2, p. 3.]

The present 70 to 76-foot roadway of Los Feliz is being used to approximately 50% of its designed capacity due to obstructions. [Tr. 182, 186, 193.] A point of congestion on Los Feliz at its intersection with Riverside Drive [Tr. 82, 92] will be eliminated with the construction of the Riverside Parkway. [Tr. 113.] Upon removal of other obstructions, by widening Franklin and Western Avenues which connect to Los Feliz and elimination of the grade crossing, use of Los Feliz by motor vehicles will increase. [Tr. 196.] [fol. 199] The number of train movements has materially increased in the last fifteen years [Tr. 71, 107; Ex. 4] and *the length of freight trains has been drastically increased* during the lives of some of the Railroad's personnel. [Tr. 256.] All passenger trains are either just starting or slowing almost to a halt while passing the Los Feliz grade crossing. [Tr. 67.] Freight trains also operate at reduced speed because they are either slowing up as they approach the Los Angeles yards or they are picking up speed as a result of leaving the yards. [Tr. 67.] With the present volume of traffic, backlash * occurs during peak hours as a result of train movements. The backlash occurs both at San Fernando Road when the train is crossing and upon the

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* Backlash is the term used to describe the backing up of traffic from one intersection where it is stopped to block another intersection. [Tr. 179.]

railroad tracks when east-bound traffic, released after a train movement, is stopped at the intersection of San Fernando Road. [Tr. 188, 189, 190, 191.] In the future when traffic volumes increase on Los Feliz, such backlash will become a common occurrence. [Tr. 197.]

[fol. 200] ARGUMENT

Point I

The Public Utilities Commission Has the Exclusive Power and Duty to Allocate Costs of Grade Separations

Article XII, Section 22, of the California Constitution provides, in part, that:

> "No provision of this Constitution shall be construed as a limitation upon the authority of the Legislature to confer upon the Public Utilities Commission additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred upon the Public Utilities Commission in this Constitution, and the authority of the Legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this Constitution."

Article XII, Section 23, provides, in part:

> "* * * The railroad commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the State of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the Legislature, and the right of the Legislature to confer powers upon the railroad commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this constitution.

[fol. 201] Pursuant to such constitutional provisions the Legislature enacted the Public Utilities Act, now incorpor-

ated in the Public Utilities Code. Section 1202 of the Public Utilities Code reads as follows:

"Section 1202. Exclusive powers of commission. The commission has the exclusive power:

"(a) To determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use, and protection of each crossing of one railroad by another railroad or street railroad, and of a street railroad by a railroad, and of each crossing of a public or publicly used road or highway by a railroad or street railroad, and of a street by a railroad or vice versa, subject to the provisions of Sections 1121 to 1127, inclusive, of the Streets and Highways Code so far as applicable.

"(b) To alter, relocate, or abolish by physical closing any such crossing heretofore or hereafter established.

"(c) To require, where in its judgment it would be practicable, a separation of grades at any such crossing heretofore or hereafter established and to prescribe the terms upon which such separation shall be made and the proportions in which the expense of the construction, alteration, relocation, or abolition of such crossings or the separation of such grades shall be divided between the railroad or street railroad corporations affected or between such corporations and the State, county, city, or other political subdivision affected."

[fol. 202] The California Public Utilities Commission, in its Decision No. 47420, which decision petitioner is seeking to have rev-ewed, affirmed a previous holding of the Commission in Decision No. 47344, in which decision the Commission clearly set forth the law when it stated:

"There is no statutory requirement that this Commission follow any particular theory of allocation of costs. Under the theory advanced by the City of Los Angeles that the railroad should pay the additional cost of construction resulting from the presence of the tracks, the railroad's share would amount to about

86 per cent of the total costs. Under the theory advanced by the railroad that it should pay only according to the benefits it receives, and considering its contention that it receives no benefits, its contribution would be nothing.

"The authority of this Commission to allocate costs, as designated in Section 1202 of the Public Utilities Code, *supra*, is an exercise of the police power on the part of the State of California through the medium of its agency, the Public Utilities Commission. We hold that the law is well established that under the exercise of the police power a state may regulate the crossings of railroads with its highways, and may require grade separations to be erected and maintained, apportioning the costs in the exercise of its sound discretion. (*Erie Railroad Company* v. *Board of Public Utility Commissioners*, 1920, 254 U. S. 394; 65 L. Ed. 322; *Chicago, Milwaukee and Saint Paul Railway Company* v. *Minneapolis*, 1914, 232 U. S. 430; 58 L. ed. 671; *Missouri Pacific Railway Company* v. *Omaha*, 1914, 235 U. S. 121; 59 L. ed. 157; *Lehigh Valley Railroad Company* v. *Board of Public Utility Commissioners*, 1928, 278 U. S. 24; 73 L. ed. 161.)"

[fol. 203] Point II

In the Absence of Constitutional or Valid Statutory Limitations, the State and Its Duly Authorized Political Subdivisions Have Full Power and Authority, Both at Common Law and Under the Federal Constitution, to Require Separation of Grades at Crossings of Public Streets and Highways by Railroads and to Require the Railroads to Pay as Much as the Entire Cost Thereof and to Repair and Maintain the Separation Structures After Their Construction. This is a Proper Exercise of Police Power by or on Behalf of the Sovereign.

In the case of *Erie Railroad Co. v. Board of Public Utility Comrs.* (1920), 254 U. S. 394, 65 L. Ed. 322, an order had been made by the Board of Public Utility Commissioners of New Jersey requiring the Erie Railroad to install grade separations at fifteen street crossings in the city of Paterson. Fourteen of these crossings were required to be made

by means of underpassed streets and the fifteenth by means of a viaduct carrying the street over the railroad. The order required the railroad company to pay the *entire* cost of *all* of these separations, with the exception that 10% of the cost was required to be borne by a streetcar company which occupied three of the crossings. Most of the streets involved were laid out later than the railroad tracks. The railroad company insisted that compliance with the order would result in its bankruptcy and attacked the order on the grounds that it was unreasonable, arbitrary and a violation of the due process and interstate commerce clauses of the federal [fol. 204] constitution. In affirming the order the Supreme Court of the United States, speaking through Mr. Justice Holmes (254 U. S. 410, 65 L. Ed. 333), said:

> "Grade crossings call for a necessary adjustment of two conflicting interests,—that of the public using the streets, and that of the railroads and the public using them. Generically the streets represent the more important interest of the two. There can be no doubt that they did when these railroads were laid out, or that the advent of automobiles has given them an additional claim to consideration. They always are the necessity of the whole public, which the railroads, vital as they are, hardly can be called to the same extent. Being places to which the public is invited, and that it necessarily frequents, the state, in the care of which this interest is, and from which, ultimately, the railroads derive their right to occupy the land, has a constitutional right to insist that they shall not be made dangerous to the public, whatever may be the cost to the parties introducing the danger. That is one of the most obvious cases of the police power; or, to put the same proposition in another form, the authority of the railroads to project their moving masses across thoroughfares must be taken to be subject to the implied limitation that it may be cut down whenever and so far as the safety of the public requires. It is said that if the same requirement were made for the other grade crossings of the road, it would soon be bankrupt. That the states might be so foolish as to kill a goose that lays golden eggs for them has no bearing on their con-

stitutional rights. If it reasonably can be said that safety requires the change, it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of [fol. 205] the soil. (Citing cases.) To engage in interstate commerce the railroad must get on to the land; and, to get on to it, must comply with the conditions imposed by the state for the safety of its citizens. Contracts made by the road are made subject to the possible exercise of the sovereign right. (Citing cases.) If the burdens imposed are so great that the road cannot be run at a profit, it can stop, whatever the misfortunes the stopping may produce. (Citing cases.) Intelligent self-interest should lead to a careful consideration of what the road is able to do without ruin, but this is not a constitutional duty. In the opinion of the courts below the evidence justified the conclusion of the board that the expense would not be ruinous."

In *Cincinnati I. & W. R. Co.* v. *Connersville* (1910), 218 U. S. 336, 54 L. Ed. 1060, the railroad maintained an embankment across Grand Avenue in the City of Connersville, Indiana, and thereby blocked passage between the northerly and southerly parts of the street. The city council adopted a resolution that said avenue should, as a matter of public necessity, be opened as a public street through the railroad embankment and proceeded to condemn a street easement through the embankment for the full width of the avenue. At a trial by jury compensation was awarded to the railroad only for the land thus condemned. The trial court instructed the jury that it was the duty of the defendant railroad company to construct and keep in safe condition all highway crossings and that the railroad would not be entitled to any damages for constructing the necessary crossing or abutments and bridge for supporting its railroad over and across the street when constructed. The trial court refused to instruct the jury that in considering the [fol. 206] railroad's damages it should take into account the cost to the railroad of constructing a bridge to carry its railroad over the proposed street. No award was made for the cost of such bridge, etc. Thus the city bore the expense

of the construction of the street and the railroad was required to install the necessary bridge to carry its tracks. The judgment was affirmed by the Supreme Court of Indiana and upon appeal to the Supreme Court of the United States was again affirmed. On such appeals the railroad company contended that the police power of the state cannot be so applied as to require the railroad company to build the bridge without compensation. In affirming the judgment, the Supreme Court of the United States, speaking through Mr. Justice Harlan, said (218 U. S. 343, 54 L. Ed. 1064):

"If the railway company was not entitled to compensation on account of the construction of this bridge—whether regard be had to the 5th or the 14th Amendments of the Constitution, or to the general reserved police power of the state—then it is clear that the jury were not misdirected as to what should be considered by them in estimating the damages which, under the law, the railway company was entitled to recover.

"The question as to the right of the railway company to be reimbursed for any moneys necessarily expended in constructing the bridge in question is, we think, concluded by former decisions of this court; particularly by *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 562, 582, 584, 591, 50 L. Ed. 601, 605, 606, 608, 26 Sup. Ct. 341, 4 A. & E. Ann. Cas. 1175; *New Orleans Gas Light Co. v. Drainage Comrs.*, 197 U. S. 453, 49 L. Ed. 831, 25 Sup. Ct. Rep. 471; *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 571, 38 L. Ed. 269, 274, 14 Sup. Ct. Rep. 437; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226 254, [fol. 207] 41 L. Ed. 979, 990, 17 Sup. Ct. Rep. 581; *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25 L. Ed. 336. See also *Union Bridge Co. v. United States*, 204 U. S. 364, 51 L. Ed. 523, 27 Sup. Ct. Rep. 367. The railway company accepted its franchise from the state, subject necessarily to the condition that it would conform at its own expense to any regulations, not arbitrary in their character, as to the opening or use of streets, which had for their object the safety of the public, or the promotion of the public convenience, and which might, from time to time, be established by the municipality, when proceeding under legislative au-

thority, within whose limits the company's business was conducted. This court has said that 'the power, whether called police, governmental, or legislative, exists in each state, by appropriate enactments not forbidden by its own Constitution or by the Constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good.' *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 297, 43 L. Ed. 702, 706, 19 Sup. Ct. Rep. 465, 470."

In *Chicago, M. & St. P. R. Co. v. Minneapolis* (1914), 232 U. S. 430, 58 L. Ed. 671, the City of Minneapolis had acquired certain property for park purposes which included two lakes in their entirety and a portion of the shores of a third lake, together with large tracts of land in the vicinity. It proceeded to construct two canals connecting the three lakes, together with walks on either side thereof. The railroad owned a right of way 100 feet wide which crossed the path of one of the proposed canals and the city sought to condemn an easement for this canal and its lateral walks across this right of way. The railway tracks at the point in [fol. 206] question were located on an artificial embankment 18 feet above the water level of the lakes. It was agreed that the city should take the land and construct the canal and walks and that the railway company should build the bridge according to plans prepared by the city, but the railway company reserved its right to recover damages or compensation in the the condemnation action and claimed, in addition to the value of the land taken (which was paid), that it should be compensated for the entire cost of the necessary bridge across the canal and such further sums as would be sufficient to maintain the bridge. The judgment in the condemnation case awarded to the railroad only the value of the land taken together with the cost of certain features of the bridge which were purely ornamental. In affirming the judgment the Supreme Court of the United States, speaking through Mr. Justice Hughes, said (232 U. S. 437, 58 L. Ed. 674):

"The question thus presented is whether the refusal to allow compensation for the cost of constructing and

maintaining the necessary railroad bridge across the gap in the right of way, made by the building of the canal, amounts to a deprivation of property without due process of law.

"*It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings, but also to build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their tracks, or to carry their tracks over such highways. . . .*" (Emphasis ours.)

Quoting from a Minnesota case the court proceeds:

"'A railroad company receives its charter and franchise subject to the implied right of the state to establish and open such streets and highways over and across its [fol. 200]' right of way as public convenience and necessity may, from time to time, require. That right on the part of the state attaches by implication of law to the franchise of the railroad company, and imposes upon it an obligation to construct and maintain at its own expense suitable crossings at new streets and highways to the same extent as required by the rules of the common law at streets and highways in existence when the railroad was constructed.' . . . (Citing cases.)

"Under the doctrine of these decisions, it necessarily follows that if the city of Minneapolis had opened a public road through the embankment of the plaintiff in error, the latter would have had no ground to complain that its constitutional rights had been violated because it was compelled to bridge the gap at its own cost. No different rule could be applied because the highway was laid out in order to increase the advantages of a public park. In this aspect, it would be equally a crossing devoted to the public use (citing cases); and we see no basis for a distinction in principle in the case of an intersecting public road opened under competent authority because such a highway might lead to public recreation grounds instead of to places of business, or might connect lakes instead of avenues."

In *Missouri Pacific R. Co. v. Omaha* (1914), 235 U. S. 121, 59 L. Ed. 157, the City of Omaha by ordinance required the

railroad to construct a viaduct over its line at its intersection with Dodge Street, together with approaches thereto along the southerly line of Dodge Street, leaving the northerly side of the street open to public traffic. The ordinance required construction of the viaduct in accordance with plans and specifications prepared by the city engineer. The railroad brought this action in the federal courts. The Cir- [fol. 210] cuit Court (which was then the federal court of original jurisdiction) dismissed the bill and this decree was affirmed both by the Circuit Court of Appeals and the Supreme Court of the United States. The latter court, speaking through Mr. Justice Day, said (235 U. S. 127, 59 L. Ed. 160):

> "That a railway company may be required by the state, or by a duly authorized municipality acting under its authority, to construct overhead crossings or viaducts at its own expense, and that the consequent cost to the company as a matter of law is *damnum absque injuria*, or deemed to be compensated by the public benefit which the company is supposed to share, is well settled by prior adjudications of this court. (Citing cases.)
>
> "This is done in the exercise of the police power, and the means to be employed to promote the public safety are primarily in the judgment of the legislative branch of the government, to whose authority such matters are committed, and so long as the means have a substantial relation to the purpose to be accomplished, and there is no arbitrary interference with private rights, the courts cannot interfere with the exercise of the power by enjoining regulations made in the interest of public safety which the legislature has duly enacted. (Citing cases.)"

In *Lehigh Valley R. Co. v. Board of Public Utility Comrs.* (1928), 278 U. S. 24, 73 L. Ed. 161, the railroad sought to enjoin enforcement of an order made by the Board of Public Utility Commissioners of New Jersey requiring the railroad to eliminate two railroad grade crossings and to substitute in their place a single overhead crossing at the *sole expense of the railroad company* in the amount of $324,000.00. In

addition to raising the usual constitutional objections, the [fol. 211] railroad claimed that an adequate crossing could be built for at least $100,000.00 less than the amount it was required to expend under the order and also claimed that the order unconstitutionally imposed a direct burden on interstate commerce and violated the interstate commerce law in that the required expenditures exceeded the legal duties of the railroad and the reasonable requirements of public safety and convenience. The case was instituted in the United States District Court and was heard by a three-judge court which dismissed the bill. On appeal the Supreme Court affirmed the decree of dismissal and, speaking through Mr. Chief Justice Taft, said (278 U. S. 33, 73 L. Ed. 166):

"This highway is not infrequently crowded with vehicles. When route No. 29 is completed, it will certainly be more crowded. The immediate prospect of using new route 29 makes greater room in the roadways most desirable. The large expenditure to secure such advantages does not seem to be arbitrary or wasteful when made for two busy highways instead of one.

"It is not for the court to cut down such expenditures merely because more economical ways suggest themselves. The board has the discretion to fix the cost. The function of the court is to determine whether the outlay involved in the order of the board is extravagant in the light of all the circumstances, in view of the importance of the crossing, of the danger to be avoided, of the probable permanence of the improvement and of the prospect of enlarged capacity to be required in the near future and other considerations similarly relevant."

* * * * * * *

[fol. 212] (278 U. S. 34, 73 L. Ed. 167.) "A railroad company in maintaining a path of travel and transportation across a state, with frequent trains of rapidity and great momentum, must resort to reasonable precaution to avoid danger to the public. This court has said that where railroad companies occupy lands in the state for use in commerce, the state has a constitutional right to insist that a highway crossing shall not be dangerous to the public, and that where reasonable safety

of the public requires abolition of grade crossings, the railroad can not prevent the exercise of the police power to this end by the excuse that such change would interfere with interstate commerce or lead to the bankruptcy of the railroad. (Citing cases.) This is not to be construed as meaning that danger to the public will justify great expenditures unreasonably burdening the railroad, when less expenditure can reasonably accomplish the object of the improvements and avoid the danger. If the danger is clear, reasonable care must be taken to eliminate it and the police power may be exerted to that end. But it becomes the duty of the court, where the cost is questioned, to determine whether it is within reasonable limits."

* * * * * * *

(278 U. S. 35, 73 L. Ed. 167): "The care of grade crossings is peculiarly within the police power of the states (citing cases), and if it is seriously contended that the cost of this grade crossing is such as to interfere with or impair economical management of the railroad, this should be made clear. It was certainly not intended by the Transportation Act to take from the states or to thrust upon the Interstate Commerce Commission investigation into parochial matters like this, unless by reason of their effect on economical management and service, their general bearing is clear."

[fol. 213] So zealously have the courts guarded the police power of the states and their political subdivisions with respect to railway crossings of highways that they have held in numerous cases where municipalities have by contract agreed with railway companies to pay the expense of maintenance and repair of grade separation structures after their construction, that such contracts are void as against public policy since they constitute the virtual abdication of sovereign powers, it being said in such cases that the "police power cannot be contracted away." See for examples: *Chicago M. & St. P. R. Co. v. Minneapolis* (1914), 232 U. S. 430, 58 L. Ed. 671, and *Northern Pacific R. Co. v. Minnesota ex rel. Duluth* (1907), 208 U. S. 583, 52 L. Ed. 630.

In the latter case the court, speaking through Mr. Justice Day, said (208 U. S. 596, 52 L. Ed. 636):

> "There can be question as to the attitude of this court upon this question, as it has been uniformly held that the right to exercise the police power is a continuing one, that it cannot be contracted away, and that a requirement that a company or individual comply with police regulations without compensation is the legitimate exercise of the power, and not in violation of the constitutional inhibition against the impairment of the obligation of contracts. (Citing cases.) . . . We find no error in the judgment of the Supreme Court of Minnesota holding the contract to be void and beyond the power of the city to make, and it will, therefore, be affirmed.

Many other decisions both by the Supreme Court of the United States and by state courts of last resort might be cited in support of this point. The courts are practically unanimous in announcing the law to be as the above cited and quoted cases declare it.

[fol. 214]

Point III

There Is No Logical or Legal Basis for the Contention That the Costs of This Grade Separation Improvement Should Be Borne by the Parties Respectively in Accordance With the Benefits To Be Received by Them, nor Are Any Such Benefits Mathematically Calculable

At the public hearing in this matter the Southern Pacific Company, through its witness Paul, introduced in evidence Exhibit No. 20. This exhibit boils down to an argument that the portion of the costs of constructing the underpass which should be allocated to the Southern Pacific Company should not exceed the benefits to the Company. With this contention we do not agree.

The courts have upheld our position in the few cases in which the question of relative benefits has been presented to them and where no federal aid was involved.

In the case of *State of Missouri ex rel. Wabash R. Co. v. Public Service Comm.* (Mo., 1936), 100 S. W. 2d 522, 109 A. L. R. 754, where the Public Service Commission of the

State of Missouri assessed against the railroad 40% of the cost of an elaborate grade separation *through a public park*, the Supreme Court of Missouri, in sustaining this order, said (100 S. W. 2d 527):

"The Wabash argues strenuously that the separation of the grade was made primarily for the convenience and benefit of the traffic on the highways and that the percent of cost of the improvement assessed against the railroads was grossly out of proportion to benefits received by them . . . . It is evident from the findings of the Commission, which were amply supported by the evidence, that due to crossing gates maintained by [fol. 215] the Wabash the crossing was not very dangerous. The heavy traffic on the highway was compelled to stop for passing trains. This caused considerable delay, inconvenience, and so-called troublesome traffic jams, and materially interfered with the free use of the highway. By the law of necessity all traffic on a highway must give railroad trains the right of way . . . . This is not such a case, but suppose a crossing was considered entirely safe because gates and watchmen were maintained by the railroad company, and let us further suppose that due to the number of trains passing over the crossing it materially interfered with the heavy traffic over a highway, would it be unlawful in such a case to assess a part of the cost of separating the grade crossing against the railroad? The separation in such a case would be for the benefit of the traffic upon the highway and not the railroad, yet the inconvenience created would be due entirely to the presence of the railroad. In such a case it certainly would not be unreasonable to assess against the railroad at least a part of the cost of restoring the usefulness of the highway. In the cases of *State ex rel. Alton Ry. Co. v. Public Service Commission*, 334 Mo. 985, 70 S. W. (2d) 52, and *State ex rel. Alton R. Co. v. Public Service Commission*, 334 Mo. 995, 70 S. W. (2d) 57, cited by the Wabash, structures separating grade crossings were in existence. These were found to be inadequate due to the increase in travel. The railroad was compelled to pay a part of the cost. Note what

this court said in 70 S. W. (2d) 57, *loc. cit.* 60 (5-6): 'Elimination of danger of collision between vehicles and trains and benefit to the railroad because of that or other reasons is to be considered in proportioning costs, but these matters are not alone controlling. *Nor is benefit the fundamental consideration in proportioning expense. The true basis of apportionment of* [fol. 216] *the cost has been declared by this court to be the extent to which the presence of the railroad at the place enhances the cost of a necessary improvement. State ex rel. Kansas City Terminal R. Co. v. Public Service Comm.*, 308 Mo. 359, 272 S. W. 957. If the presence of the railroad is the sole cause of an improvement necessary for the public safety, it may be required to pay the entire cost. *Chicago, Rock Island & Pacific Ry. Co. v. Public Service Comm.*, 315 Mo. 1108, 287 S. W. 617.' So in *State ex rel. M., K. & T. Ry. Co. v. Public Service Commission*, 271 Mo. 270, 197 S. W. 56, 59, court *en banc*, an existing subway was found inadequate and the major portion of the cost of enlarging the structure for the sole purpose of accommodating the travel upon the streets was assessed against the railroads. This court in the course of the opinion said: '* * * but the safety of passing trains is only one of the elements to be considered in matters of this kind. It is not the sole or controlling element. The convenience and necessities of the traveling public using Rollins Street must likewise be considered.' We see no distinction in principle between those cases and cases where the presence of a railroad renders a street inadequate to accommodate the traveling public." (Emphasis added.)

In the case of *State ex rel. Chicago, R. I. & P. Ry. Co. v. Public Service Commission* (Mo., 1934), 72 S. W. 2d 101, the Supreme Court of Missouri, in sustaining an order of the Public Service Commission dividing the costs of reconstructing an old highway underpass equally between the county and the railroad, said (72 S. W. 2d 103):

"Of the contention that the whole cost of the reconstruction of the grade separation should be borne by

[fol. 217] St. Louis county because relator will derive no benefit, we may say in the words of this court, used in *State ex rel. Kansas City Southern Ry. Co. v. Public Service Commission*, 325 Mo. 862, 30 S. W. (2d) 112, *loc. cit.* 115: 'There is no question of assessment of benefits in the case. It is a question of providing for the public safety by reasonable methods.' The trestle was built, as relator stated in its answer before the Commission, 'in what was known as the horse-drawn vehicle age.' The narrow one-way passage between the supporting bents was reasonably safe in that day. But in this day of motor vehicles, it is full of perils of collisions of automobiles with each other or with the bents. Expert witnesses for the county and for the railroad testified to these hazards."

In the case of *Lehigh & N. E. R. Co. v. Public Service Commission* (1937), 191 Atl. 380, 382, the Superior Court of Pennsylvania, in approving an order of the Public Service Commission of that state requiring the reconstruction of an old and inadequate underpass and allocating the cost thereof among the state, the county and the railroad, said:

"The order of the commission was within its power and supported by the evidence, and is reasonable and in conformity with law.

"Those conditions which may have brought about the necessity for a new underpass do not operate to relieve appellant. It is a question of providing for public safety by reasonable methods. The underpass built in 1911 may have been sufficient at that time; it is insufficient and perilous today. In order to prevent accidents and promote the safety of the public, the com- [fol. 218] mission acted within its power, if the facts warranted, in ordering its reconstruction and in apportioning the cost thereof. Appellant's contention that it will receive no benefit from the proposed construction is not convincing. The question of benefits is not involved. 'It is the presence and ownership of the track involved, not any benefit conferred, which places liability on the railroad.' *Lehigh Valley R. R. Co. v. Public Service Comm.*, 105 Pa. Super. 423 at page 428, 161 A. 422 at page 424."

If benefit to the railroad were a relevant consideration in this case, the benefit already accorded to the railroad at the expense of the public in the form of right of way at grade crossings should also be considered. This privilege could be removed by the Public Utilities Commission at any time. The Commission, for reasons of safety and giving due consideration to the needs of both railroad and street traffic, could require the railroad trains to yield the right of way to street traffic as often as street traffic was required to stop and yield the right of way to railroad trains. The resulting delays to the railroad, as well as increasing hazards of the railroad and consequent liability of the railroad for public injuries, would be incalculably great.

The Railroad has indicated there will be only an insignificant benefit in respect to the hazard of accidents and consequent possibility of liability [Ex. 20] based upon experience during the past ten years at the Los Feliz crossing. [Tr. [fol. 219] 313.] The probability of increasing instances of backlash occurring in future years [Tr. 197] when traffic volumes on Los Feliz increase [Tr. 185] with vehicles being repeatedly stopped upon the railroad tracks and unable to move [Tr. 191] certainly presents a hazardous condition at the crossing and it should not be necessary to await a serious accident which might cost the company as much as the cost of constructing the grade separation before considering the benefit derived from the elimination of such a hazard.

With respect to the insignificant amount of benefit claimed by the Railroad in connection with the hazard of accident and consequent possible liability of the railroad for public injuries, the words of Mr. Justice Holmes in the case of *Erie R. Co. v. Board of Public Utility Commissioners*, 254 U. S. 394, 413, 65 L. Ed. 322, 335, are characteristically pertinent and concise:

> "If we could see that the evidence plainly did not warrant a finding that the particular crossings were dangerous, there might be room for the argument that the order was so unreasonable as to be void. The number of accidents shown was small, and if we went upon that alone we well might hesitate. *But the situation is one that always is dangerous.* The board must be supposed to have known the locality, and to have had an

advantage similar to that of a judge who sees and hears the witnesses. The courts of the state have confirmed its judgment. *The tribunals were not bound to await a collision that might cost the road a sum comparable to the cost of the change.*" (Emphasis added.)

[fol. 220] A. The Nashville Case

The petitioner stresses the case of *Nashville C. & St. L. R. Co. v. Walters* (1935), 294 U. S. 404, 79 L. Ed. 949, in the belief that that decision changes the law set forth earlier in this brief. For reasons which will be hereinafter explained, we do not concur with petitioner's belief. In considering that case, the following points should be noted:

One.

The Tennessee statute there involved did not confer any discretion upon the Commission, but instead required the railroad in every case to pay one-half of the cost of a grade separation. (79 L. Ed. 949 at 954.) Here our statute gives to the Commission discretion to allocate the costs and does not purport to make an arbitrary assessment against the railroads.

Two.

In the *Nashville* case, the railroad conceded

> "that in Tennessee, as elsewhere, the rule has long been settled that, ordinarily, the State may, under its police power, impose upon a railroad the whole cost of eliminating a grade crossing, or such part thereof, as it deems appropriate." (P. 954.)

The claim of unconstitutionality in that case rests wholly upon the special facts shown. Therefore the issue as to what portion of the cost should be borne by a railroad in a grade separation such as we are concerned with in this proceeding was not even an issue in the *Nashville* case. The railroad conceded that in such case it could be required to pay the entire cost!

[fol. 221] Three.

The only point decided by the Supreme Court of the United States was that the Supreme Court of Tennessee erred when it refused to consider the special facts in that case. And all the Supreme Court of the United States did was to remand the case to the Tennessee court for consideration of those special facts. The Supreme Court of the United States did not purport to determine that even under the special facts there involved it was unconstitutional to assess one-half of the cost against the railroad. Instead it expressly stated that it was not making such a determination which was, in the first instance, for determination by the Tennessee court. (P. 965.)

Included in the evidence and the findings of the trial court which the Supreme Court of Tennessee refused to consider were:

(a) that the underpass was part of a state-wide and nation-wide plan to foster commerce by motor vehicle on the public highways;

(b) that the decision to build the underpass, its location and construction, was not in any proper sense an exercise of the police power; but rather, as set forth in the bill of complaint, pursuant to a general plan of internal improvement fostered by the Congress of the United States in conjunction with the several states to make a nation-wide system of super-highways in the interest of interstate commerce by motor vehicle, much of which is in active competition with the railroads themselves;

(c) that the underpass did not involve an exercise of the police power any more than many other features of this project, such as elimination of curves, grades, widening the pavement, *et cetera;*

[fol. 222] (d) the State highways of Tennessee (as distinguished from county and city roads and turnpikes) have their origin in the Federal-aid highway legislation. The aim of that legislation is a "connected system of roads for the whole Nation"; "to provide complete and economical highway transport throughout the Nation"; to furnish "a new means of transportation, no less important to the country as a whole than that offered by the railroads"; to establish "lines of motor traffic in interstate commerce."

The immediate interest of the Federal Government is, in part, the national defense as well as the transportation of the mails;

(e) the relief of the unemployment incident to the business depression had been the main incentive for highway construction during the period in which the highway there in question was undertaken and completed;

(f) Lexington, the city there involved, was a rural community of 1823 inhabitants located in a sparsely settled territory. *The construction of the new highway with the underpass was not designed to meet local transportation needs.* It was undertaken to serve as a link in a nation-wide system of highways. State Highway No. 20, as formerly routed, passed through Lexington on Clifton Street, and crossed the railroad at grade; it was adequate for the existing traffic and that to be expected;

(g) that the present facilities were deemed locally both safe and adequate was attested by the fact that neither the city authorities, nor anyone else, had suggested elimination of that grade crossing; that the grade crossing was to remain unchanged after the new highway was put into use; and that the Clifton Street route continued to be used for the local traffic;

[fol. 223] (h) the underpass was required for a new and additional highway over which State Highway No. 20 was being rerouted, which was to become a part of a Federal-aid route between Nashville and Memphis;

(i) the underpass was prescribed, *not upon consideration of local safety needs,* but in conformity to general plans of the Federal and State highway engineers, as being a proper engineering feature in the construction of a nation-wide system of highways for high speed motor vehicle transportation; and because it was the policy of the Federal authorities to make the avoidance of grade crossings a condition of a grant in aid of construction. *The requirement of the underpass, and the payment by the Railway under the 1921 Tennessee Act of one-half the cost of separating the grades, were results of the Federal-aid legislation. Final payment of Federal aid on this project was conditioned upon commencement of the construction of this underpass.* (79 L. Ed. pp. 956-961).

In other words, the underpass there involved was con-

structed in order to qualify for Federal funds, not to meet local traffic needs.

It is obvious that the *Nashville* case is unique and no authority for the contention that the law has now been changed so that railroads cannot be required to pay the cost of eliminating a grade crossing.

As was stated by the Supreme Court of the United States in the *Nashville* case (at p. 964):

> "* * * No case involving like conditions has been found in any of the lower Federal courts; nor, excepting the case here under review, has any such been found among the decisions of the highest courts of any state."

[fol. 224] This makes it abundantly clear that the Supreme Court of the United States did not intend that the *Nashville* case should be considered as reversing the long line of prior cases setting forth the railroads' responsibility in connection with grade separations.

The elimination of a grade crossing when required, not for the purpose of local transportation needs or public safety, but for the purpose of qualifying for Federal aid (as was the situation in the *Nashville* case), is clearly distinguishable from the grade separation involved in the instant proceeding. In the *Nashville* case we had a grade crossing in a community of 1823 people in a sparsely settled area; here we have a grade crossing in a metropolitan area populated by several million persons. In the *Nashville* case we had the new interstate highway created, leaving untouched the existing grade crossing. In the instant proceeding we have a situation where local transportation needs require the improvement. No new route is being established. The existing grade crossing is being eliminated to remove a dangerous condition, such elimination being necessary in order that the street can safely handle local transportation needs.

In the *Nashville* case the Supreme Court of the United States expressly recognized the principle of law which we here urge. The court stated (at p. 964):

> "It is also true that state action imposing upon a railroad the cost of eliminating a dangerous grade

crossing of an existing street may be valid although it appears that the improvement benefits commercial highway users who make no contribution toward its cost. Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57, 75, 42 L. ed. 948, 954, 18 S. Ct. 513; Missouri P. R. Co. v. Omaha, 235 U. S. 121, 59 L. ed. 157, 35 S. Ct. 82, that a railroad has no constitutional immunity from [fol. 225] having to contribute to the cost of safeguarding a crossing with another railway line, merely because the first railroad was built before the crossing was made; Detroit, F. W. & B. I. R. Co. v. Osborn, 189 U. S. 383, 47 L. ed. 860, 23 S. Ct. 540; Northern P. R. Co. v. Puget Sound & W. H. R. Co., 250 U. S. 332, 63 L. ed., 1013, 39 S. Ct. 474, and that the State may, under some circumstances, impose upon a railroad the cost of the grade separation for a new highway. But in every case in which this Court has sustained the imposition, the new highway was an incident of the growth or development of the municipality in which it was located. Northern P. R. Co. v. Minnesota, 208 U. S. 583, 592, 52 L. ed. 630, 634, 28 S. Ct. 341; Cincinnati, I. & W. R. Co. v. Connersville, 218 U. S. 336, 54 L. ed. 1060, 31 S. Ct. 43, 20 Ann. Cas. 1206; Chicago, M. & St. P. R. Co. v. Minneapolis, 232 U. S. 430, 58 L. ed. 671, 34 S. Ct. 400; Erie R. Co. v. Public Utility Comrs., 254 U. S. 394, 409, 65 L. ed. 322, 333, 41 S. Ct. 169, P. U. R. 1921C, 143. Compare Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 554, 58 L. ed. 721, 725, 34 S. Ct. 364. And in every such case the municipality apparently bore the cost of constructing the new highway for which grade separation was required."

It should also be emphasized that the Supreme Court of the United States expressly stated, in the *Nashville* case, at page 965:

"We have no occasion to consider now whether the facts presented by the Railway were of such persuasiveness as to have required the State court to hold that the statute and order complained of are arbitrary and unreasonable. That determination should, in the first [fol. 226] instance, be made by the Supreme Court of

the State. (Citing cases.) Moreover, since that court held the facts relied upon to be without legal significance, it did not inquire whether the findings were adequately supported by the evidence introduced in the trial court. The correctness of some of the findings is controverted by the State. Other facts of importance bearing upon the issue may possibly be deducible from the evidence, or be within the judicial knowledge of that court. When the scope of the police power is in question the special knowledge of local conditions possessed by the State tribunals may be of great weight. (Citing cases.) * * *."

It is our considered opinion that the *Nashville* case, when properly analyzed, clearly supports the proposition that, in connection with a grade separation such as we are here considering, the railroad can be required to pay the entire cost of the improvement, or such lesser amount as the Commission may deem proper.

Trucks and buses passing over the Los Feliz grade crossing constitute a very small percentage of the total vehicular traffic using the crossing. [Ex. 2, p. 25.] Witness Albers testified that local transit buses accounted for most of the buses which pass over the crossing and that no certificated carrier other than the two local transit companies operated over the crossing. [Tr. 125.] Witness Albers, when asked whether the trucks that passed over the grade crossing were engaged in local transportation or local hauls, testified that the trucks were principally engaged in delivery services and other services pertaining to a neighborhood. [Tr. 126.] This testimony was uncontradicted. Thus, in the case of the Los Feliz grade crossing, we find that it is used by few if any vehicles in competition with the railroad, while it is used by [fol. 227] a large number of vehicles carrying thousands of passengers to and from the Glendale station of protestant. [Tr. 126.] The ever increasing volume of traffic at the crossing has been caused by the growth of the Los Angeles metropolitan area. It seems clear that if the Supreme Court in the *Nashville* case had been confronted with the factual situation comparable to that surrounding the Los Feliz grade crossing, it would have reached a different conclusion

and would have sustained a requirement that the railroad pay the full cost of constructing the grade separation.

Cases more recent than the *Nashville* case clearly establish that such case was not a reversal of the many prior cases holding that a railway could be required to pay up to 100 per cent of the cost of a grade separation. Instead, the *Nashville* case is applicable only to the factual situation there presented.

The case of *Lyford* v. *State of New York*, 140 F. 2d 840, decided in 1944, involves a claim of the State of New York against an insolvent railroad. The claim arose under the New York Grade Crossing Elimination Act of 1926:

> "* * * This act empowered the State Public Service Commission to order the elimination of any grade crossing which in the Commission's opinion was a menace to the public safety. Half the cost of the elimination was to be borne by the railroad whose crossing was to be eliminated, half by state and county governments, in the proportion of 49 per centum by the State and one per centum by the county or counties in which the crossings were located. If the railroad so elected, the State was authorized to pay the railroad's share in the first instance, the railroad being obliged to repay the State in a manner to be determined by the State comptroller, so that the principal and interest [fol. 228] of the State debt incurred for such elimination might be repaid when due." (Pp. 841-842.)

Under these provisions the railroad became indebted to the State in the amount of some $425,000. Thereafter the railroad filed a voluntary petition for reorganization under Section 77 of the Bankruptcy Act. A claim was filed by the State and the question was raised as to the validity of such claim.

In holding the claim valid, the court stated (p. 844):

> "* * * It is well settled that in the exercise of its police power for the protection of its citizens a state may require of even an interstate railroad that it abolish grade crossings at its own expense entirely, whatever the cost and without regard to its financial ability. See extensive discussion by Holmes, J., in *Erie*

R. Co. v. Board of Public Utility Com'rs, 254 U. S. 394, 41 S. Ct. 169, 65 L. Ed. 322, citing earlier cases; * * * (citing cases). *Hence this duty, which could have been required of the railroad alone, is here shared* with the state and county governments; and the additional privilege of installment repayment is also granted, but only upon conditions carefully safeguarding the interests of the State." (Emphasis added.)

A petition for a writ of certiorari to the United States Supreme Court was of course denied. (323 U. S. 714, 89 L. Ed. 574 (1944).)

This recent case gives no indication of any "trend" claimed by petitioner, and we again wish to emphasize that the *Nashville* case, by its very terms, turns upon a finding that the elimination of the grade crossing there involved *"was not in any proper sense an exercise of the police power"* (79 L. Ed. 949, 956, 204 U. S. 405, 417), and was to [fol. 229] a large degree an expenditure *"for the relief of unemployment"* (79 L. Ed. 949, 957, 204 U. S. 405, 418-419).

The matter involved in the *Lyford* case was again before the Court in *State of New York* v. *Gebhardt*, 151 F. 2d 902, certiorari denied 327 U. S. 788, 90 L. Ed. 1015.

Of course, it should also be mentioned that here again State highways and State funds were involved, rather than a city street. The railroad's obligation, as heretofore shown, is much greater when city streets are involved. This is undoubtedly the basis of the later amendment to the New York Act.

A case decided at approximately the same time as the *Nashville* case is that of *In re New York O. & W. Ry. Co.*, 280 N. Y. Supp. 174 (Affirmed 3 N. E. 2d 188). That case clearly indicates that the true rule is whether or not the public benefits; if so, the grade crossing may be eliminated regardless of benefit to the railroad, and the railroad can constitutionally be required to pay the entire cost, although in that case the statute only required the railroad to pay one-half of the cost.

Again in 1937, in the case of *In re Elimination of Highway-Railroad Crossings*, 299 N. Y. Supp. 693, the railroads were required to pay one-half of the cost, as provided by statute, regardless of the fact that "the New York Central

urges two objections to the order. It insists that it not only derives no benefit whatever from the new construction, but that it is decidedly damaged by reason of the change," especially in view of the fact that there was already an underpass under its tracks and that the new alignment would require its patrons to travel some 7,000 extra miles each year to reach its station.

[fol. 230] Incidentally, it might be mentioned that included in the cost of that grade separation was the cost of paving some 3,332 feet of new highway outside the subway itself.

There is, of course, a fundamental difference between a crossing separation which is a "make-work" project, using Federal funds, and a crossing separation which is admittedly necessary for the public health, safety and general welfare; or between a grade separation for private benefit, and a grade separation required by the public health, safety and general welfare. An analysis of the cases will show that, regardless of direct benefit, the railroad "has a continual obligation to participate in the matter of constructing and maintaining reasonable and adequate crossings over its tracks both at grade and at separated grades." (37 C. R. C. 767.) Further, "it is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings, but also to build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their tracks, or to carry their tracks over such highways." (*Erie R. Co.* v. *Board of Public Utility Com'rs (supra)*, 254 U. S. 394, 409, 65 L. Ed. 322, 333.) The element of direct benefit is absolutely immaterial.

B. Cases and Decisions Involving Federal Aid

The petitioner cites in its memorandum of Points and Authorities numerous cases and decisions from this and other states involving methods of apportionment where federal aid is involved. In citing such cases the petitioner wholly fails to recognize the essential distinction between the present case and that of highway construction under Federal-Aid Acts. The instant case represents an exercise of the police power by the State in its right to maintain and improve a public street, such improvement being required [fol. 231] by public safety, convenience and necessity. The

improvement is not to be financed in any part with federal aid funds.

The fact that the Federal-Aid Highway Act of 1944 and its predecessor acts limit, and in some cases eliminate, the imposition of any charge upon railroads for the cost of grade separations or modifications thereof is of no consequence here. That act does not represent an exercise of the police power by a sovereign state, but is merely an instance of a voluntary and benevolent expenditure of public funds for the benefit of the public and the various states. Obviously the Federal Government, being subject to no applicable constitutional limitations in such cases, is free to prescribe any conditions or limitations it chooses to place upon the distribution of any such gratuities. Any state not desiring to accept the federal aid subject to the prescribed conditions and limitations is free to so refrain. Moreover, if such gratuities were to be conditioned upon the imposition upon the railroads of their fair share of the cost of grade separations, the very objective of the Act would have been defeated.

The practice under the Federal-Aid Highway Act obviously has very little to do with benefits because it limits a railroad's allocation to 10%, whether or not the actual benefits are many times that percentage. On page 36 of its brief, petitioner refers to General Administrative Memorandum No. 325 of the U. S. Bureau of Public Roads issued in 1948. In that memorandum are the following statement and finding:

> "Experience has demonstrated that it is impossible to measure benefits satisfactory for individual railway-highway projects."
>
> [fol. 232] (Finding) "2. That experience under the Act has demonstrated that many of the elements of railway benefits are so vague and difficult of evaluation, are so intangible or speculative, and are the subject of such divergence of views on the part of the railroads and the State highway departments that it generally has been and is impossible for them to arrive at a mutually acceptable basis for negotiating the agreement required of them for undertaking individual railway-highway projects. This has resulted in prolonged and futile ne-

gotiations in an effort to arrive at a basis of agreement and has defeated the undertaking of many urgently needed projects."

C. Basis of Apportionment Followed Nationally and in Other States

Petitioner has argued that the trend nationally is toward allocating costs of grade separation on the basis of benefits. It would probably be more accurate to say that in recent years the railroads have successfully secured passage of legislation by more and more states relieving them of their legal obligation to provide adequate grade crossings.

As further evidence of the trend toward the so-called "benefits" principle of allocating costs, petitioner referred on page 33 of its Memorandum of Points and Authorities to Exhibit "H" attached thereto. However, it should be noted that not a single state is shown in Exhibit "H" as allocating costs strictly upon the basis of benefits. Either a limit is fixed upon the amount to be allocated to a railroad, or a fixed percentage is assigned to a railroad, or the allocation is fixed by a state agency, and not a single state agency is indicated as apportioning costs strictly upon the basis of benefits.

[fol. 233]

Point IV

The So-called Benefits Theory as Advocated by the Railroad Does Not Include Any Calculation of Many Obvious Benefits.

Petitioner's principal position appears to be that of advocating an allocation of expenses on the so-called benefits theory. We do not subscribe to this theory for many reasons: (1) it is impossible to compute real benefits with any degree of certainty; (2) it completely disregards the legal rights of the City of Los Angeles and the City of Glendale to use their street free from obstruction or interference; (3) it further disregards the legal obligations inherent in the operation of the railroad. However, in view of the strenuous argument made by the Railroad in this regard, we feel it might be well to call attention to some of the benefits received by the Railroad.

A. General Principle to Be Used in Determining Benefits Received by Railroad

First, there can be no question that, as a matter of equity, if the railroads are to be given the right of way over vehicular traffic at points where the railroads cross public streets, then all costs incident to making such crossings safe should be assessed against the railroads. This being so, it necessarily follows that when the inconvenience to the public resulting from giving the railroads such right of way becomes so oppressive and hazardous to the public that grade separations are necessary, the railroads should be required to pay the cost of such grade separations in excess of that which it would cost the cities to improve their public streets in the absence of the rail- [fol. 234] roads. We recognize that the method of railroad operation is such that it would be extremely costly and impractical, if not impossible, to require the railroads to yield the right of way to vehicular traffic. That is the reason the railroads have received special consideration and have been accorded the right of way. However, as an incident of, and a condition upon which the railroads were accorded such special treatment the obligation to provide safe grade crossings and necessary grade separations was properly levied against the railroads. If the railroads would operate in the same manner as other traffic and comply with the laws of the road applicable to other traffic, this special burden would of course not be assessed against the railroads; there would be no necessity for such special treatment. But the special privileges enjoyed by the railroads, accorded to them so that they might operate in a preferred manner, entail certain obligations, of which this is one.

Therefore, the entire premise upon which Mr. Paul and other Railroad witnesses attempt to determine the benefits accruing to a railroad from a grade separation is entirely false. *This is so as their computations and opinions have all been predicated upon the assumption that the railroad has the absolute and unconditional right to operate in total disregard of all other traffic, both vehicular and pedestrian.*

The railroads have not been given the right of way over other traffic without having placed on themselves

the obligation to provide necessary crossing protection, [fol. 235] and to provide, at their sole expense, grade separations when required by the public convenience and necessity.

As was stated by the Supreme Court of the United States speaking through Mr. Chief Justice Hughes, in *Chicago, M. & St. P. R. Co.* v. *Minneapolis* (1914), 232 U. S. 430, 58 L. Ed. 671, at 674:

> "It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings, but also build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their tracks, or to carry their tracks over such highways."

Numerous other cases, holding that a railroad is obligated to pay the entire cost of a grade separation, could be cited. This has always been the law, and it is still the law.

The only time the railroads cannot be required to pay the full cost of grade separations is when there is a statutory provision specifically providing otherwise. Such statutes indirectly provide further subsidies to the railroads and are, in effect, gifts of public funds to the railroads. In California the statute does not provide any specific amount which the railroads shall be relieved of paying, but instead leaves it to the discretion of the Public Utilities Commission. In our opinion, it would be an abuse of discretion for the Commission to apply the so-called benefits theory on the basis argued for by the railroads. To do so would be totally unrealistic and would completely disregard the legal and equitable obligations of the railroads.

[fol. 236] If the railroads are no longer willing to assume the burden necessarily imposed upon them as a concomitant part of the special privileges they enjoy, then let them also relinquish their special privileges.

B. Benefits From Longer Trains

In connection with the benefits which the railroads receive from grade separations, there are of course numerous other matters which should be mentioned.

With the operation of longer trains, which are a benefit to the railroads, the railroads receive a greater benefit from grade separations. *But for the existence of grade separations at critical crossings the public would not endure the intolerable delays at these grade crossings which would result from these longer trains.* In fact, the public, in righteous indignation, would demand the elimination of all grade crossings at the expense of the railroads, if it were not for separations at major crossings.

C. Benefits From Use of Tracks for Storage Purposes

Mr. J. A. Mellen, Planning Director of the City of Glendale, testified that with the separation of grades at Los Feliz the Railroad would have a track length of 4,815 feet for temporary storage of trains. [Tr. 68.] This length would be sufficient to store all freight trains operating over the Valley Line where trains are limited to 86 cars in length [Tr. 253], or approximately 4,730 feet long calculated by allowing 50 feet per car and caboose and 380 feet for diesel units. [Tr. 245.] Trains operating on [fol. 237] the Coast Line would be longer and if they were stored on the tracks across Los Feliz they would only block a minor crossing at Chevy Chase Drive. [Shown in Exhibit 19.] While the Railroad Superintendent denied that the Railroad would stop a freight train on the main line [Tr. 244], he admitted that on occasion they did so. [Tr. 247, 252.] While claiming that the track distance of 4,815 feet between Brand Boulevard and Chevy Chase [Tr. 68] upon which an 86-car train could be stored would be of no value to the Railroad for temporary storage purposes, the Superintendent indicated that another section of track sufficient to store a 72-car train [Tr. 247] of which the Railroad operates only a few [Tr. 254], would be of value for storage. [Tr. 247.]

From the foregoing facts, it is not difficult to see that there will be benefit to the Railroad with respect to its

ability to use the track for temporary train storage purposes.

D. Benefits From Use of Streets as "Feeder" for Railroad

The railroad itself materially benefits from use of the public streets as feeders for its railroad business. This is illustrated by the following testimony of Mr. Mellen:

> "Q. Could you describe the relationship of the crossing to the Glendale depot of the Southern Pacific Railway, Southern Pacific Company? A. It is only a short distance from the Los Feliz crossing to the depot grounds. As a matter of fact, in the original grant to the railroad, a portion of the depot [fol. 238] grounds abut the crossing itself on the southeasterly side.
>
> Mr. Karr: Could you repeat that again? I am sorry.
>
> (Record read.)
>
> The Witness: The station is an important one in the metropolitan area, being a metropolitan sub-center type of station where passengers, particularly from all of the Hollywood area and all of the Glendale area and the La Crescenta Valley, much of the—well, yes, —all of the La Crescenta Valley, and anyone who seeks to avoid the congestion and problems of the central (center) of Los Angeles at the Union station, use this station as the convenient means of boarding trains. All of the passengers who approach the station from the west and southwest approach it by way of Los Feliz Boulevard, or some highway that reaches and comes from that direction. Therefore, it is quite important as far as the convenience of the customers of the railroad that a safe crossing be provided, safe and convenient crossing. There are, I would say, literally thousands of passengers who board at that point, or disembark at that point, in order to avoid the delay of going on into the city of Los Angeles and to be in a position to more directly reach their respective destinations without going through the congested portion of the metropolitan area." [Tr. 65, 66.]

Although witness Paul for the Railroad denied that the grade separation would be a benefit to patrons of the [fol. 239] Railroad in reaching the Glendale station because it would be a circuitous route for some, he also admitted that the greater percentage of the patrons use Gardena Avenue for an approach to the station. [Tr. 322.] An examination of Exhibit 19 shows that the Gardena Avenue approach is only slightly longer and Exhibit 2, page 20, indicates that the Gardena Avenue approach will still be available for use by patrons of the Railroad.

Thus, the Railroad witnesses contend that motorists should be made to pay almost all of the cost of the grade separation because they receive most of the benefit, but for some unexplained reason, motorists on their way to patronize the Railroad are not benefited.

E. Benefits Accruing to Railroad From Elimination of Grade-crossing Accidents

In connection with benefits received by the railroads from grade separations, it is important to consider grade crossing accidents.

While the accident experience at the Los Feliz crossing in recent years indicates an average annual cost to the Railroad of only $475.00 per year [Ex. 20], one serious accident could involve a substantial amount of damage to railroad property. [Tr. 347.] It is obvious that one accident might involve the railroad in large claims for injuries to persons or property. The estimate of future damage claims based upon experience of the past ten years is inadequate and purely speculative considering the increased hazards which will develop as traffic volume on Los Feliz [fol. 240] increases. From the safety standpoint, a grade separation is a great benefit to the Railroad, a benefit growing greater every day.

F. Benefit From Improved "Good Will"

Another factor, although intangible, is "good will." Certainly a railroad loses good will by these grade crossings. And we are not here referring to those poor unfortunates who are mangled and maimed by the trains, nor

to the widows and orphans of the victims slaughtered at grade crossing accidents. Neither are we referring only to the passengers who are on the trains delayed by the accident, nor to the relatives and friends of such passengers who patiently (or impatiently) wait at the station to meet the arriving passengers, only to see the time of arrival of the train repeatedly changed to a later hour. Primarily we are referring to the motorist, who potentially is a patron of the railroad, either as a passenger or shipper, who, while delayed at a grade crossing, swears to never again patronize that railroad.

G. Benefit From Improved Drainage of Station Grounds

At times of heavy rainfall, water flows in the track area, flooding the tracks at the grade crossing and also the Glendale station of the Southern Pacific Company. [Tr. 129.] When the grade separation is constructed it will intercept and collect the water now passing over the Los Feliz crossing. The disposal of the water through the grade separation drainage structure will remove such water from the tracks at the crossing and improve conditions at the station. [Tr. 130.]

[fol. 241]

Point V

The Orders of the Commission Constitute a Justified and Reasonable Exercise of the Police Power

The Railroad has contended that the police power may only be exercised to promote public safety and convenience, and that there was no evidence of unsafe conditions, or that the Railroad had contributed to a situation where the convenience and necessity of the public are adversely affected. [Petitioner's Memorandum of Points and Authorities, p. 60.] We do not agree with petitioner's conclusions from the evidence.

The grade crossing has been the scene of many accidents. [Ex. 2, p. 30.] Fortunately the accidents to date have not been particularly serious. This is due, in part, to the fact that crossing gates are maintained day and night and all vehicular and pedestrian traffic is stopped at the approach of trains. However, this method of protecting the grade crossing is now creating other hazardous

conditions because of the great volume of local traffic now necessarily using Los Feliz. The stopping of this traffic for the length of time necessary for a long freight train to clear the grade crossing results in "backlashing"; that is, delayed traffic backs over San Fernando Road and other streets. [Tr. 188.] For example, vehicles caught in this "backlash" become completely blocked in the intersection of San Fernando Road and Los Feliz. Unable to go either forward or backward, these vehicles are helplessly trapped in a very hazardous situation, with heavy traffic, including many large trucks, approaching such [fol. 242] trapped cars at substantial speeds, from both directions on San Fernando Road.

"Backlash" now occurs on the railroad during peak hours. [Tr. 189, 190, 191.] As traffic flow on Los Feliz increases in the future, backlash will become a common occurrence. [Tr. 197.] Traffic volume has increased from 16,000 vehicles per day in 1923, to 27,000 vehicles per day in 1951 [Ex. 2, p. 4] and traffic volume is expected to increase. [Tr. 185, 193, 197.] The standing of vehicles on a grade crossing as a result of backlash, unable to move forward or backward, presents an obviously hazardous situation, and such a situation can be expected to be a common occurrence in the future. [Tr. 197.]

The Railroad has contended that it has not by any act created or increased any inconvenience, obstruction, or interference affecting the general public who use the Los Feliz crossing. [Petitioner's Memorandum of Points and Authorities, p. 60.] But what does the evidence show?

The number of train movements has increased materially since 1936. [Tr. 71, 107.] On August 7 and 8, 1936, at the Goodwin Avenue crossing, which is over a half mile from the Los Feliz crossing [Ex. 19], there were 24 or 25 train movements counted per day inclusive of any switching operations [Tr. 107], while on Sunday, June 17, 1951, there were 54 train movements (exclusive of 9 switching movements), on Monday, June 18, 1951, there were 60 train movements (exclusive of 16 switching movements), and on Wednesday, June 20, 1951, there [fol. 243] were 59 train movements (exclusive of 13 switching movements). [Ex. 4.] It is thus apparent that the

number of freight and passenger trains has increased from not more than 24 or 25 per day in 1936 to 59 or 60 per day in 1951, an increase of approximately 140%.

During the period of service of Harry R. Gernreich, Superintendent of the Los Angeles Division, Southern Pacific Company train lengths increased from 35-car trains when he was a brakeman to the present day 90- to 100-car trains which are quite common. [Tr. 256.] During the past twenty-five years train lengths have increased from 75- to 80-car trains to 90- to 100-car trains [Tr. 256] or at least 20%.

The increased number of train movements and the increase in the length of trains operated obviously has increased the inconvenience to, obstruction of, and interference with that portion of the public using the Los Feliz crossing.

The present condition at this grade crossing presents an intolerable situation, both from a safety and a delay factor. Even assuming that the operation of crossing gates, with no regard to the delay caused to vehicular and pedestrian traffic, renders the grade crossing itself relatively safe, this does not eliminate the hazard caused by the grade crossing. As has been shown, this merely transfers the main point of hazard from the grade crossing itself to other intersections. But it is the grade crossing which causes the hazard.

[fol. 244] Further, we do not believe it to be the law that public convenience can be totally disregarded in determining steps necessary to make a grade crossing safe. If this were the law the simple procedure would be to permanently close the public street. Obviously, it would be absurd for the Railroad to argue that by closing the public street the hazard of the existing grade crossing could be removed without the necessity of constructing a grade separation. It is equally absurd to argue that this heavily traveled street may be temporarily closed at more or less frequent intervals, with the resulting chaotic interruption of vehicular and pedestrian traffic, as a means of making the crossing safe. The expediency of temporarily closing a public street in order to make a grade crossing safe may only be resorted to when to do so does not cause excessive

public inconvenience and delay. The hazard resulting from a grade crossing must be eliminated in a manner which does not cause excessive public inconvenience or delay. When the application of this principle requires a grade separation, then the railroad can be required to pay the full cost of the grade separation, or such lesser amount as the Public Utilities Commission may determine. In this case the Public Utilities Commission has determined that the public safety, convenience and necessity require the separation; that it is practical to provide the separation; and that the costs should be allocated as set forth in its order. This order of the Public Utilities Commission is valid and binding.

[fol. 245] Conclusion

Throughout these entire proceedings the City of Los Angeles and the City of Glendale have maintained the position that the proper basis of allocating expenses of a grade separation involving a city street is to require the cities to pay the amount it would cost the cities to improve the city street, in the manner proposed, if there were no railroad tracks; and to require the railway to pay the additional cost resulting from and necessitated by the presence of railroad tracks.

As has been stated:

> "* * * The true basis of apportionment of the cost has been declared by this court to be the extent to which the presence of the railroad at the place enhances the cost of a necessary improvement."
>
> *State of Missouri ex rel. Wabash R. Co.* v. *Public Service Comm.*, 100 S. W. 2d 522, 109 A. L. R. 754.

See, also:

> *State ex rel. Kansas City Terminal R. Co.* v. *Public Service Comm.*, 272 S. W. 957.

The formula advocated by the City of Los Angeles and the City of Glendale can be applied with mathematical exactness in every case, and, in our opinion, gives full and

proper consideration to both the legal and equitable principles applicable to grade separations.

We recognize that under the law the Public Utilities Commission has the exclusive power to allocate costs of [fols. 246-252] grade separations. When, as here, the Commission, after a full and fair hearing, and based on adequate evidence and findings, and in the exercise of a sound discretion, makes an order allocating costs, then the order of the Commission is a final determination of the matter.

We therefore respectfully submit that the Petition for Writ of Review should be denied.

Ray L. Chesebro, City Attorney, Bourke Jones, Assistant City Attorney, Roger Arnebergh, Assistant City Attorney, Attorneys for the City of Los Angeles, a Real Party in Interest.

Henry McClernan, City Attorney, John H. Lauten, Assistant City Attorney, Attorneys for the City of Glendale, a Real Party in Interest.

[fol. 253] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

[Title omitted]

PETITIONER'S REPLY TO ANSWER OF THE RESPONDENT PUBLIC UTILITIES COMMISSION AND TO ANSWER AND BRIEF OF THE CITY OF LOS ANGELES AND THE CITY OF GLENDALE—filed January 22, 1953

Foreword

The principal decision of the Public Utilities Commission in the present proceeding, rendered June 30, 1952, is identified as No. 47420, and is now officially reported in the Commission's published decisions: 51 Cal. P.U.C. 788. A supplementary decision, identified as No. 47597, which denied the [fol. 254] petition for rehearing filed by this petitioner, but made certain minor changes in the text of the principal decision, was rendered August 19, 1952. Both of these decisions were reproduced in the Appendix to our petition;

No. 47420 at pages 19-36 inclusive, and No. 47597 at pages 84-85.

More recently, at the instance of the City of Glendale, the Commission rendered its further decision No. 47819 in this proceeding, in which it postponed the prescribed date for the commencement of the construction provided for in the principal decision, pending the expected court review thereof. Decision No. 47819 is reproduced in a Supplemental Appendix, attached to this reply. It should be added that this petitioner did not either assent to, nor oppose, the postponement requested by the City of Glendale.

The Commission, as the principal respondent, has filed a lengthy answer to our petition addressed to this Court. The Cities of Glendale and Los Angeles, as parties in interest, have also filed a separate answer and brief in opposition to the petition. While the Commission and the Cities advance somewhat similar arguments, we have thought it preferable, for the sake of convenience in analyzing their separate presentations, to treat them separately, except as to certain limited matters where the answers largely duplicate one another. The first part of this reply is therefore directed to the Commission's answer (for convenience generally identified simply as the "answer"); and the second to the Cities' answer and brief (for convenience generally referred to as the "Cities' Br.").

At the outset we direct attention to the fact that the Commission's answer demonstrates that it has made erroneous findings and conclusions in two vital respects:

[fol. 255] *First*, it has erroneously found, in the paragraph (on p. 795 of its printed report, p. 32 of the Appendix to our petition) in which it states that the construction of the Los Feliz underpass is appropriate and practicable, that such construction *is in the interest of public safety*. Its own analysis of the evidence (its answer, p. 12) shows that no substantial safety consideration is involved; indeed, as we point out more fully by calculation from the facts recited by the Commission at this page of its answer, it is shown that the actual hazard of a collision of a motor vehicle with a train at this crossing is less than one to 13,000,000; and the hazard of a casualty to a person

in a motor vehicle at the crossing is less than one to 36,800,000.

Second, it has erroneously found in the paragraph immediately following the paragraph last referred to, that the proposed construction does not concern a state highway. Its own recital of the facts, at page 5 of its answer, shows that the stoppage of traffic at the railroad crossing at Los Felis causes a "backlash" of traffic that affects San Fernando Road; i.e., U. S. Highway 99, only 320 feet away; and that the proposed grade separation, if constructed, would relieve this congestion. This second erroneous finding is equally vital to the decision under challenge: because, as more fully shown in our original petition and again in the discussion which follows, if a state highway is concerned, the State Department of Public Works is involved, and may and should be called upon to contribute. In that event Federal highway funds, furnished to the State by the Federal Government, would be used; and the railroad's contribution would be limited, by Federal law, to its actual benefits, not exceeding 10 per cent of the overall cost.

[fol. 256] Apart from these two vital errors, each of which is fully apparent on the face of the Commission's answer, this case involves the broader question whether, in the light of controlling constitutional principles as declared by the United States Supreme Court, the Commission can disregard special facts showing that safety is not involved, and that the proposed construction is for the primary and, indeed, practically the sole purpose of permitting and promoting the rapid and uninterrupted movement of motor traffic; and whether by reason of such disregard the Commission can then reject the sound principle that contribution by the interested parties to a grade separation shall be in accordance with the benefits respectively derived; and instead of following that principle, and without any other basis than its own arbitrary conclusion, require this petitioner, the interested railroad, to pay half of the total cost, or any other amount far exceeding any possible or even arguable benefit which it will receive.

I

Reply to Answer of the Public Utilities Commission

"Preliminary Statement"

Answer, pages 1-5

The Commission's preliminary statement contains a summary of some of the facts, which as we view the record is substantially correct. This statement identifies the location of the grade-separation involved; states the names of the interested parties; and recites that a cooperative investigation was undertaken (in which petitioner participated) for the purpose of studying the various types of structures which should be considered, the estimated costs of the construction, and certain other factors pertinent to [fol. 257] the question whether the separation was economically justified. As stated by the Commission, that study was introduced in evidence (as Exhibit 2) in the proceedings before the Commission leading to the decision and order here under challenge. It may be added that the title page, and Part V, of that exhibit, are reproduced as Exhibit F in the Appendix to the petition herein (pp. 86 to 91 of the Appendix).

We have already called attention to the fact that the Commission declares and admits (Ans., p. 5) that the instant record shows that stoppage of traffic at the present Los Feliz crossing causes a "backlash" of traffic that affects traffic on San Fernando Road, and that this interference and congestion would be remedied by the proposed separation. San Fernando Road is otherwise known as U.S. Highway 99, a Federally-aided highway. This admission is significant, because of the Commission's subsequent attempt (Ans., p. 51) to complain of petitioner's criticism of the finding, made by the Commission (as we have recited) at page 795 of its printed decision (51 Cal. P.U.C. 788; p. 32 of the Appendix to the petition) that the proposed construction *does not concern* a state highway. It is obvious, from the record and the Commission's present admission, that one of the reasons urged for the proposed construction is to relieve or avoid vehicular congestion (i.e., blocking at the intersection) upon a principal state highway, at a

point only 820 feet from the present crossing. In the face of these facts, it is clear that petitioner's comment upon this finding (p. 37 of petitioner's opening brief) is fully justified. If it was not the Commission's purpose to avoid contribution by the State Department of Public Works because of the involvement of the state highway, that fact [fol. 258] should have been disclosed by forthright avowal in the answer. Certainly the finding is erroneous, and directly contrary to the evidence; and that error is now openly confessed by the Commission.

At pages 6 and 7 of its answer the Commission refers to the estimates of the various benefits which would result from the construction of the Los Feliz separation. The staff studies to which the Commission refers appear at pages 793-794 of the printed decision (p. 28 of the Appendix to the petition). They were taken from Part V of Exhibit 2 in the proceedings before the Commission (at p. 87 of the Appendix). This showing indicates that the total annual monetary saving, including an estimated amount ($57,362) to cover savings to *operators* of *motor vehicles*, because of the elimination of "vehicular delays," would be $71,890; but this would be offset by additional expenses for depreciation and maintenance on the railroad portion of the proposed structure, amounting to $8611. The result would be a net annual saving, accruing to all parties interested in the structure, amounting to $63,279; but as stated, $57,362 of this sum would be the benefits realized by the *motor-vehicle operators*, through the *elimination of delays to their motor vehicles*. The balance, $5917, represents the sum total of the actual net benefit to petitioner. Thus on the basis of the Commission's own estimates of monetary benefits from the proposed construction, petitioner would realize only 9.35 per cent of the total annual benefit (the ratio of $5917 to $63,279).

It is not correct, as stated by the Commission (Ans., p. 6) that petitioner contended that the grade-separation [fol. 259] would have been of no benefit to the railroad, or that there would be no saving to the company in money paid to employees. On the contrary, the petitioner agrees that it would save $14,053 per year in the cost of operating and maintaining the crossing gates, which figure includes

the wages of the crossing gatemen or watchmen; and it agrees also that it could expect to save $475 annually, in moneys paid out for personal injuries, and property damages sustained by private individuals, and by the railroad company itself, because of accidents at the crossing in which the petitioner's trains or employees are involved. The total of these two items, $14,528 per year, is offset, as the Commission's own figures show, by the increased expenses incident to depreciation and maintenance of the railroad-owned portion of the proposed structure, amounting to $8611 per year. Thus the net annual benefit to the petitioner, after consideration of the savings in employee wages and all of the other factors, amounts to $5917 annually, which is actually the figure shown by the Commission's own Exhibit No. 2, and agreed to by petitioner's representative in the proceedings before the Commission. (See p. 794 of the Commission's printed decision, and Exhibit 20; Appendix, pp. 29, 115-116).

"Construction Cost Allocation"

Answer, page 7

In this portion of its answer the Commission asserts that it "found it to be in the interest of public safety, convenience and necessity to make the following cost allocations"; and thereupon quotes the cost allocation appearing at the conclusion of its decision and immediately preceding its formal order (Decision, p. 796; Appendix, p. 34). The [fol. 260] Commission's statement is not correct. The allocation was not stated to have been made *in the interest of public safety, convenience and necessity.* The Commission's formal finding in its decision, in which these factors are referred to, appears at page 795 (Appendix, p. 32), and is as follows:

> "We hereby find it to be in the interest of public safety, convenience and necessity and that it would be practical *to require the construction of a grade separation* at the intersection of the Southern Pacific tracks and the Los Feliz Road * * *" (Emphasis added).

The finding as to the allocation of costs was completely separate and not related at all to the finding of the considerations that persuaded the Commission to approve the construction. It followed a discussion of the position of the parties on this point, and a statement of the Commission's own theory as to allocation. It will be noted that this finding also followed the Commission's erroneous statement that the proposed construction did not concern a state highway, a finding which its admission at page 5 of its answer shows to have been mistaken, as already pointed out.

After making this erroneous finding, the Commission rejected the benefit principle of cost allocation in grade separation proceedings, though without discussing the question at any great length; and thereupon simply said (at p. 796) that the cost should be allocated (one-half to petitioner, one-fourth to Los Angeles County, and one-eighth to each of the cities). The opinion contains no finding whatever showing the basis of the percentage figures employed in the allocation, nor even any reference to the methods by which they may have been derived; and no explanation has ever been offered or attempted, other than that these figures represent the Commission's own judg-[fol. 261] ment. Instead, the Commission takes refuge in the position that its judgment and discretion cannot and must not be questioned; and as illustrated by numerous passages of its answer, resorts to abuse of the petitioner and criticism of its motives, because petitioner dares to question that judgment, and to assert that the determination should not prevail, unless some logical and reasonable basis therefor can be assigned.

The foregoing also serves to emphasize the distinction which petitioner makes between the Commission's conclusion and (ultimate) finding that the construction of the separation is justified on the basis of convenience to the motoring public, and the Commission's further and separate conclusion (which is not in the least a *finding of fact*) as to the proportions of the cost to be borne by the several parties. This distinction is of fundamental importance, for the primary reason (if for no other) that the former is not challenged; whereas the invalidity of the latter, *as a matter*

of law, is the very essence of petitioner's position before this Court.

Answer, pages 8-9

At these pages of its answer the Commission indulges in some rather pointed criticisms of petitioner; seeking to support these criticisms by what we regard as misrepresentations. Additional examples of the same type of argument are also found at page 18, and again at page 48, of the answer.

Thus, at the top of page 8 the Commission refers to a "novel and fallacious theory," assertedly advanced by the petitioner, that regardless of public safety and welfare, petitioner will not share in the necessary expenses incidental to grade separations, or other like highway improvements, unless the railroad derives a "readily calculable [fol. 262] direct monetary benefit or financial gain." Of course this is not at all an accurate reflection of the principle invoked by petitioner in the present proceeding. Petitioner merely asserts, on the basis of what it deems to be controlling constitutional principles, stated by highest authority and widely recognized elsewhere, that it should not be compelled to contribute to the cost of a facility constructed for the primary benefit of others, particularly where (as here) no substantial safety considerations are involved, except to the extent that it will fairly benefit from that construction. In other words, petitioner believes that it should not be compelled to pay for that which it does not receive; especially when others, many of them its competitors, will be the beneficiaries of that compelled payment. Certainly the fundamental principle that a private individual should not be required to pay out his funds, when he will receive no benefit commensurate with the expenditure, is neither "novel," nor "fallacious."

It is equally untrue that petitioner denies the obvious advantages expected to result from the proposed Los Feliz separation, or that it hopes or expects to escape from any obligation or responsibility resting upon it as a railroad common carrier operating in this state. Petitioner has stated without reservation, and states again, that it does not oppose, but on the contrary is willing to join in, the proposed construction at Los Feliz, and realizes that many

advantages will be secured to others thereby (as well as some rather modest benefits to itself); and insofar as such benefits do accrue to petitioner, petitioner is willing to pay its appropriate share of the necessary cost (see Exhibit 20; Appendix, pp. 115-116).

[fol. 263] Reference is made to the petitioner's interest in or ownership of certain highway common carriers, such as Pacific Motor Trucking Company, Greyhound Corporation, and the Railway Express Agency; and in this connection the Commission states that it finds difficulty in reconciling petitioner's interest in these highway operations with what the Commission characterizes as a "blanket repudiation of any and all concern in the public highways of this State."

This is simply one more misrepresentation of petitioner's position. There has been no "repudiation" of concern in the State's highways. On the contrary, petitioner believes and expects that its affiliated and subsidiary companies who operate on the State's highways should and will contribute to the cost of facilities such as this separation, constructed for their use and benefit. Petitioner favors and supports measures intended to insure that *all* highway users pay their fair share of the highway costs. These subsidiary companies presently pay all costs levied against them in respect to their use of the highways, through their license fees, taxes, and other levies imposed by the State and its sub-divisions; including where applicable taxes or other assessments imposed by the cities of Glendale and Los Angeles. Petitioner therefore believes that these companies, in common with all other companies and individuals operating on the highways, and particularly on Los Feliz, should and will be called upon to pay the major share of the expense of the separation, such payment being made in the same manner that all other contributions of highway users are made: i.e., through the agency of the public authorities which levy taxes upon them, and use those taxes for highway purposes.

[fol. 264] It should be emphasized, moreover, that the Commission has not sought to justify the proposed imposition of 50 per cent of the cost upon petitioner, because of the use of the highways by its subsidiary and affiliated or

related companies. The proposed imposition is to be placed upon petitioner as a railroad company, operating a railroad line; and the allocation is sought to be justified, apparently, because of the presence of the railroad as a hindrance to the free movement of motor vehicles on the roadway. We say "apparently," because neither the Commission's decision, nor its answer, contain any other explanation; whereas in both the necessity for the separation, *in the interest of free and rapid movement of automotive traffic,* is given major prominence.

Answer, pages 11-12

At these pages the Commission refers to certain of the evidence relied upon as supporting the decision to build the separation. It is to be noted that the Commission states that "Los Feliz is an important traffic artery—a natural important route;" and in connection with that statement refers particularly to the *congestion, delays* and *inconvenience* to the traffic *using that road.* This statement should be considered in connection with the Commission's prior admission (p. 5 of the Answer) with respect to the results of the congestion, when highway traffic is interrupted by the passage of a train at the grade crossing, in causing a "backlash" which adversely affects traffic on San Fernando Road (Highway 99) and thus also in connection with the Commission's erroneous finding (p. 795 of its Decision; p. 32 of the Appendix to the Petition) "that the proposed construction does not concern a state highway." [fol. 265] Immediately following this emphasis upon the elements of *congestion* and *resulting delay and inconvenience* to vehicular traffic, which would be greatly *improved* by the separation, the Commission refers (Ans., p. 12) to the accident record at the Los Feliz crossing. That record shows that with the present protection, by manually operated gates throughout the 24 hours of the day, there have been only 14 collisions between motor vehicles and trains at the crossing, over a period of more than 25 years, with 9 personal injuries and one death. While the Commission does not so state in its answer, the record indicates that the one death occurred when an automobile was deliberately driven through the crossing gates at high speed, and

into the side of a train. In this connection reference may also be had to the accident showing embodied in Exhibit 2 in the proceedings before the Commission, and reproduced at page 89 of the Appendix to the petition. That showing indicates that in *15* of the *26* years referred to, there were *no* collisions between trains and automobiles at Los Feliz crossing. In the years in which such accidents occurred (except for 4 in 1948), the maximum number in any year was *one*. The ten personal casualties occurred as follows: 2 in 1930, 1 in 1932, 1 (fatal) in 1939, 1 each in 1942 and 1943, and 4 in 1948.

The Commission shows, and the record bears out the statement (Appendix to the petition, p. 91) that the total motor vehicle movement over the crossing averages about 27,000 vehicles per day of 24 hours. The showing referred to is based on vehicle counts taken in 1949, 1950 and 1951. On this basis, the average frequency of accidents, with or without injuries, at the Los Feliz crossing, was stated in our [fol. 266] initial petition and brief (at p. 62) as being in the ratio of about 1 to every 1,750,000 crossings by vehicles. We are now advised that our earlier computation greatly overstates the actual hazard. Assuming an average daily movement of only 20,000 vehicles per day over the crossing, the actual likelihood of any vehicle being involved in a collision with a train at the crossing, based on the experience of the past 25 years, amounts to less than one in 13,000,000! The chance of personal injury to an occupant of a vehicle is even less. Assuming two persons in each vehicle, and again only 20,000 vehicles per day (although the counts show 27,000), the mathematical chance of a personal injury due to a collision with a train at the crossing, based on 25 years experience there, is less than one to 36,800,000.

The Commission suggests (Ans., p. 51) that our reference in our opening brief to the history of the accidents at the crossing, and our conclusion therefrom that the crossing is not potentially dangerous, is an "improper implication."

The fact is that the accident showing upon which we rely is contained in the Commission's own exhibit. It was offered for the specific purpose of showing whether there was a substantial hazard at the crossing, sufficient of itself to

justify the construction of the grade separation or amounting to a material factor in considering whether it should be built. It is not only customary, but essential, to rely upon experience to determine whether a particular situation or method of operation is hazardous, and if so the extent of that hazard. The statistical method of measuring hazard which was employed in our opening brief, and is again set forth above, is the customary and ordinary method of so [fol. 267] doing. Not only has it frequently been employed by the Commission itself, in its periodical reports and analyses, but it also has received the sanction of the Interstate Commerce Commission, which likewise publishes periodical accident reports; and more particularly, it has received the approval of the United States Supreme Court. Thus that Court, in *Retirement Board* v. *Alton R. Co.*, 295 U.S. 330, not only referred to statistical showings of this character as indicating the progress of safety upon the American railroads, but actually incorporated such showings in footnotes to its opinion (295 U.S., at p. 365). In *Southern Pacific Company* v. *Arizona*, 325 U.S. 761, statistical showings of the same character, presented by both the railroad and the State, were cited and relied upon by the Supreme Court, and were likewise referred to in footnotes annexed to the opinion (325 U.S., at pp. 778-779). In short, for the Commission to say that the lack of actual accident hazard to vehicular traffic at this crossing cannot be demonstrated by the statistical record which has been prepared by and in cooperation with its own staff, is to disavow its own standard practice, and to challenge methods which have received practically universal approval of all of the courts and other tribunals before which similar questions have been presented.

The fact stands out, beyond any possibility of challenge on this record, that *no justification for the proposed separation exists, on the basis of actual hazard at the crossing.* If any justification be found, it must reside in the elimination of inconvenience and delay to motor traffic using the roadway. There is no other basis or justification whatsoever. [fol. 268] This is not to say that we do not regard the elimination of vehicular delay as an ample and adequate justification, or that we regard the record showing in this

respect as insufficient to support the Commission's conclusion that the separation should be built. But the very fact that the primary reason and purpose of the separation is to promote the rapid and uninterrupted movement of motor vehicles demonstrates that the "vehicular public" will be the principal beneficiary; and if the Commission's order apportioning the costs is permitted to stand, the petitioner, as a rail carrier, will be compelled to contribute for the benefit of such vehicular traffic, including many of its competitors, and to that extent to its own actual detriment.

The Commission's Decision No. 47344, in the Washington Boulevard Case

Answer, page 15

At this page the Commission refers to its own earlier decision No. 47344 (51 Cal. P.U.C. 771), which involved the reconstruction and widening of certain grade separations where Washington Boulevard in Los Angeles underpasses the tracks of the Atchison, Topeka and Santa Fe Railway Company. It will be noted that in that decision, which is cited in the text of the decision here under attack, the Commission asserted that its jurisdiction to apportion the costs required merely the exercise of its sound discretion, and referred to a number of earlier decisions of the United States Supreme Court. The Commission's present quotation omits any reference to the most recent decision of the Supreme Court bearing upon this issue: *Nashville, C. & St. L. R. Co. v. Walters*, 294 U.S. 405. However, that decision is discussed at length elsewhere in the answer; and the [fol. 269] Commission's attempt to avoid its application to the case at bar will be discussed in that connection.

We point out here merely that the Commission's reliance upon the Supreme Court's decisions referred to in its own decision No. 47344 is reviewed at length in our petition at pages 37 to 44; and to save repetition we refer the Court to that discussion. We emphasize again, that in those cases the holdings of the Court were predicated primarily upon the point that *danger to the public* was involved, and that the separations in question were being constructed prima-

rily in the interest of public *safety*. The elimination of *delays* to *motor vehicles* using the public highways, to some extent as competitors of the railroad, was hardly even mentioned, if at all. The danger to the public at the crossings was the motivating factor. Obviously those cases have no application here, where the hazard to the public at the present grade crossing is shown by the Commission's own sponsored exhibit to be completely negligible.

"Conflicting Contentions of the Parties"

Answer, pages 16-18

In this portion of its answer, the Commission undertakes to state the position of the petitioner but (as also occurs elsewhere in the answer) the Commission's attempted statement is far from accurate. It is *not* true that petitioner argues that the decisions of the Supreme Court, upon which the Commission has relied, are arbitrary, unreasonable and unconstitutional. Petitioner argues merely that they have no application in the case at bar, because the question which confronted the Commission, and is now before this Court, is entirely different, in that the element of hazard at the [fol. 270] Los Feliz crossing simply does not exist in a practical sense.

The Commission also asserts that there is no *logical* or *legal* basis for the contention that the cost of this grade separation should be borne by the parties in accordance with benefits to be received, nor are any such benefits mathematically calculable. A short and simple answer to this statement is that the benefit basis of allocating costs of grade crossings is now a *legal*, i.e., *statutory*, requirement, where Federal-aided highways are concerned: in that no railway involved in a grade-crossing project constructed in whole or in part from Federal funds may be required to contribute other than in accordance with the *net benefits* which it shall receive. The statutory provision (quoted at pages 35-36 of our petition) is Section 5(b) of the *Federal Aid Highway Act of 1944*, 58 Stat. L. 838-841. Whatever the Commission's opinion in the matter, apparently the Congress has been impressed with the propriety of the benefit principle; for this provision was not only enacted in

1944, but was extended in 1948, 1950, and again in 1952, and is still in effect. Moreover, similar provisions are contained in *General Administrative Memorandum No. 325*, issued in 1948 by the United States Bureau of Public Roads, the Federal agency charged with the duty of administering the Federal-Aid Highway Acts.

Additionally, statutes and decisions providing for the allocation of grade-separation costs on the basis of benefits are the law in several of the states: notably Michigan, and New York, by express statute; Florida, Nevada, New Mexico, New Jersey, Ohio, and West Virginia, by either statute [fol. 271] or practice (see pages 98 and 99 to the Appendix to our petition).

Finally, the benefit basis was adopted by the Commission itself, as early as 1933 in the so-called *Goshen Case* (January 16, 1933), 38 C.R.C. 380; and having been affirmed in the same year in the *Alto Overpass Case* (Decision 25811, April 10, 1933), 38 C.R.C. 606, thereafter became the controlling rule in this state for a period of about 18 years. Exhibit G of the Appendix to our petition (pp. 92-97) contains a listing of 108 grade separations constructed in California involving the Southern Pacific and two of its affiliated railroad lines (but not including the other railroads), showing the total cost, *the apportionment of the cost* as between the parties concerned, and the numbers of the Commission's orders whereby the construction and apportionment were approved.

It is true that in most of these cases the parties agreed that the railroad would not be benefited, and therefore should not contribute, and that the entire cost of the separation was to be borne by the other interested parties, usually the State Highway Commission or other public authority concerned. But it is likewise true that in at least some of the cases cited, where the railroad company bore a portion of the cost, the allocations were shared on the basis of respective benefits, and such allocations were approved by the Commission. Thus it will be seen that if there is no *logical* or *legal* basis for the benefit principle, as the Commission now contends, it would appear that the Congress of the United States, the Federal Bureau of Roads, the public authorities in several of the larger states, and last but not

[fol. 272] least, the Public Utilities Commission itself, for a period of about 18 years, have been proceeding without support of either logic or law.

Petitioner believes that both abstract logic, and the prevailing legal view, support its position that grade-separation costs should be borne by the parties in accordance with the benefits received, and that that principle should continue to prevail in California as it has in the past.

The statement that the benefits are not mathematically calculable is simply not true in this case: as is indicated by Part V of the Commission's Exhibit 2, reproduced at page 87 and following of the Appendix to the Petition. There appears on page 87 an actual calculation of the monetary benefits that would be expected to accrue from this separation. It is true that the author of the exhibit stated that it is not possible to determine with any fine degree of accuracy the *public* benefits that might accrue from the construction; but he did not then, nor did anyone else, challenge at all the accuracy of the calculation of the benefits which would accrue *to the petitioner*. Indeed, the Commission itself appears to concede (at pp. 793-794 of its printed decision; pp. 37-39 of the Appendix) that the value of these benefits has been properly calculated, with substantial accuracy. It will be noted that it does not challenge the figures, but simply rejects the benefit principle in its entirety.

We do not overlook, in this connection, the Commission's attempt (at p. 49 of its answer) to argue that the separation will confer upon petitioner certain benefits in addition to those entering into this calculation. This point is discussed in more detail hereafter. However, the Commission's pres-[fol. 273] ent position that the benefits are not mathematically calculable stands out in strange contrast to its position in the *Goshen* and *Alto cases*, supra, where the benefits were apparently readily susceptible to calculation, and in fact were determined to the satisfaction of all of the parties concerned.

At page 18 of its answer, in the course of this same discussion, the Commission after referring again to petitioner's alleged interest as a highway user, through the motor-truck operations of its subsidiaries and affiliated companies, describes petitioner's position in the present

case as an "astounding and unprecedented about-face in thus repudiating all prior performance in California grade separations of such priority concern."

This extraordinary statement is an outstanding example of the time-worn device of accusing the opposing party of tactics which the accuser has himself adopted and followed. The fact is, as demonstrated by our reference to the uniform policy of the Commission for the entire period since and including 1933, that petitioner is taking here the same position which the Commission, the petitioner, and generally the other parties in interest have taken, for a period of about 18 years. If "prior performance," in connection with California grade separations, is of any importance in the opinion of the Commission, then surely the petitioner is on solid ground in taking the same position *here*, as was taken *by the Commission* consistently ever since the decision in the *Goshen case*, and up to its decision No. 47344 (1952; 51 Cal. P.U.C. 771) in the *Washington Boulevard case*. There is no doubt that the Commission's action in this case, and the *Washington Boulevard case*, is both "astounding" [fol. 274] and "unprecedented," and that it constitutes a complete reversal and repudiation of its own prior performance in California grade-separation cases. The lengthy record of such performance (1932-1951) is too exhaustive and complete to permit any other conclusion.

At page 19 of its answer the Commission refers to the so-called *Nashville case*, also sometimes referred to as the *Walters case*, and already cited herein as *Nashville C. & St. L. R. Co.* v. *Walters*, 294 U.S. 405. The Commission says of this decision, "for which there is neither precedent nor other foundation in the established law of the land"; and, after intervening discussion which appears to have no particular bearing upon the present case, declares that the *Nashville case* is the worst selection that petitioner could have made in its "attempted reversal and overthrow of the now firmly established grade separation law of the land."

It is apparent that the Commission's conception of the "law of the land," in this connection, is simply that the Commission shall be free to exercise its unfettered and unarbitrary discretion, based upon some undisclosed stand-

ard (if any), rather than definite considerations of the purposes of the construction and the resulting expenditure, and of the benefits which will be conferred, or any other concrete and consistent basis. Actually, if there be an established grade-separation law of the land (and petitioner firmly believes that there is), its principles are recognized in *Section 5(b)* of the *Federal Highway Act of 1944*, (quoted in full at page 35 of our petition), and in *Administrative Memorandum No. 325* of the United States Bureau of Public Roads; supplemented, of course, by the controlling principles adopted and followed by the United States [fol. 275] Supreme Court in the *Nashville case*.

"The So-Called Nashville Case"

Answer, pages 19-25

In this portion of its answer the Commission discusses the *Nashville case* at length, in the attempt to show, *first*, that it is not authoritative, and *second*, that even if controlling as to the situation there involved, it has no application in the case at bar because of differences in fundamental facts. The *Nashville case* is discussed at pages 20 to 25 of our petition, and referred to in a number of passages thereafter. To save repetition, we ask the Court to review that discussion in connection with this reply.

The Commission first remarks (Ans., p. 19) that the *Nashville case* is no authority for the inference or contention by the petitioner that the law has now been changed, so that railroads are not now to be required to pay the cost of grade separations. The fact is that petitioner makes no such contention. Petitioner cites the *Nashville case* to the point that under the provisions of the due-process clause of the 14th Amendment to the Federal Constitution (which have not been changed), a railroad may not be compelled to contribute to the cost of a grade separation, *particularly where safety is not involved* (as in the present case) and the sole essential purpose of the separation is to promote the convenience and rapidity of movement of highway traffic, in any amount greater than the benefits which the railroad may reasonably expect to derive; in short that, as in

any other situation, an individual may not be compelled to pay for that which he does not receive.

[fol. 276] On page 20 of its answer, the Commission undertakes to list three asserted differences between the *Nashville case* and the present case. The first of these is, in effect, that in that case a *statute* was under attack which specified the exact amount (½) to be assessed against a railroad involved in a grade separation; whereas here, so it is said, the statute confers discretion upon the Commission to allocate the costs, and does not purport to make an arbitrary assessment.

This statement demonstrates how completely the Commission misconceives the nature of not only the *Nashville case*, but also the present case. The petition here does not present a challenge to the State statute, but to an *order* made by the Commission, under purported authority of that statute, which *order* is asserted by the Commission to have the force and effect of a statute (Ans., pp. 41-43). The essential issue is whether such an *order*, not made directly by the legislature, but by a state agency acting under purported authority of the legislature, can be valid in the light of the protection afforded by the due-process clause, and the commerce clause, of the Federal Constitution, when the facts show that that order operates to take petitioner's property, and to devote it to the procurement of benefits for others, and to impose undue burdens upon the petitioner and thus upon the interstate commerce which it conducts. The *Nashville case* was decided under the due-process clause, the Court having held, in effect, that upon the special facts shown, the railroad's property was being taken from it arbitrarily, and without just cause or recompense. Petitioner asserts that the same principle applies to the case at bar.

In its second point, the Commission asserts that the claim of unconstitutionality in the *Nashville case* rested wholly [fol. 277] upon the special facts shown, and that the issue as to what portion of the cost should be borne by a railroad "*in a grade separation such as we are concerned with in this proceeding*" was not even an issue in the *Nashville case* (Emphasis ours.). This statement on the part of the Commission is equivalent to saying that the present case does

not resemble the *Nashville case*, because of asserted differences in the facts. Notwithstanding this assertion, the cases are quite similar in the essential and controlling facts, as more fully shown in our discussion in our opening brief. In particular, the petitioner's claim of invalidity of the challenged order rests, as did the claim in the *Nashville case*, upon special facts which demonstrate, and are not even challenged as showing, that in this case (as in that one) the railroad is being called upon to bear burdens wholly disproportionate to any possible benefits. In this case, as in that one, the main purpose of the proposed separation is the furtherance of the uninterrupted rapid movement of motor vehicles. As demonstrated by the Commission's own showing, the alleged hazard at the crossing is infinitesimal, and the separation could not possibly be justified from the safety standpoint. Thus in this case, the issue is whether a railroad may be compelled to pay large sums of money, not for the elimination of any hazard to which it is a party, but solely for the purpose of eliminating delay to motor vehicles and promoting their rapid and uninterrupted movement; and that precise issue was presented and decided in favor of the railroad in the *Nashville case*.

As its third attempted point of difference, the Commission asserts that the only point decided by the Court, in the *Nashville case*, was that the Supreme Court of the State had [fol. 278] erred in refusing to consider the special facts in that case and all that was done was remand the case for such consideration. It is also asserted that the Court did not even purport to determine that, under the special facts involved, it was unconstitutional to assess half of the cost against the railroad. Careful reading of the opinion discloses that the Court, in the *Nashville case*, held that the state court had erred in refusing to consider *and to give proper weight to* the special facts brought forward by the railroad, which demonstrated the absence of any material benefit accruing to it, and the consequent unconstitutionality of the fixed statutory imposition of 50 per cent, regardless of benefit. The case was remanded (p. 434) "for further proceedings not inconsistent with this opinion": which remand required the lower court to consider the case further,

in the light of the benefit principle set forth and approved in the opinion, notably at p. 430.

In short, in the *Nashville case* the State's action, which had been approved by the State court, resulted in imposing upon the railroad 50 per cent of the cost of the separation. Such action had been undertaken without regard to special facts showing that the benefits to the railroad did not justify that apportionment. In the case at bar the Commission, as a state agency, has made and now seeks to maintain an identical apportionment, for an identical purpose, and again without giving any proper consideration or material weight to special and undisputed facts showing that the benefits to the railroad do not justify that assessment.

At page 22, and continuing to the top of page 23, the Commission asserts that the *Nashville case* is "unique," and "no authority for the contention that the law has now been [fol. 279] changed so that railroads cannot be required to pay the cost of eliminating a grade crossing." After citing from the opinion, the Commission continues with the observation that the Supreme Court did not intend the *Nashville case* as reversing the long line of prior cases setting forth the railroad's responsibility in connection with grade separations.

The *Nashville case* is not in the least unique, in the sense apparently intended by the Commission. It is true that the *Nashville case* was apparently the first in which the Supreme Court was called upon to determine whether a railroad could be compelled to contribute as much as 50 per cent of the cost of a separation, where the principal or even the entire benefits would obviously accrue to the motor traffic using the separated roadway, and no substantial hazard existed requiring elimination. However, the *Nashville case* has been cited and followed as an authority, in a number of more recent cases. The listing of all of these cases would extend this brief unduly, but it may be noted that it has been cited and following in California, by both this Court and the District Court of Appeal, in the following cases:

Palermo v. *Stockton Theatres* (1948), 32 C.2d 53 (62), 195 P. 2d 1;

Perez v. *Lippold* (1948), 32 C.2d 711 (737), 198 P. 2d 17;

San Diego v. *Van Winkle* (1945), 69 C.A.2d 237 (245), 158 P.2d 774.

It was also cited in the concurring opinion of Judge Wilbur in *San Francisco* v. *Market St. Ry.*, 98 Fed. 2d 628, 642. Other citations by state courts include: *Pa. R. Co.* v. *Driscoll*, 330 Pa. 97, 198 Atl. 130 (135); *Grasso* v. *Bd. of Adjustment*, 137 N.J. 630, 61 Atl. 2d 167 (169); *Elimination of* [fol. 280] *Spencer Crossing*, 5 N.Y.S. 2d 946, 254 App. Div. 412; *Elimination of Highway-Railroad Crossings*, 299 N.Y. Supp. 693 (702). It should be especially noted that the last two cases cited involved the apportionment of the expense of grade-crossing eliminations in New York, and the principle of the *Nashville case* was followed.

The essential point, which the Commission appears not to have understood or appreciated in its discussion of the *Nashville case*, is that the Court there made a distinction between its prior decisions (upon which the Commission currently relies: see its answer at pages 30-38, and our discussion of these same cases in our petition, at pages 38-43), upon the ground that in the earlier cases the essential question was whether a railroad might be called upon to contribute substantially to the elimination of a *dangerous* grade crossing over an existing street; whereas in the *Nashville case*, there was no question of elimination of hazard, but only of constructing a facility for the purpose of furthering the rapid and uninterrupted movement of highway traffic, much of it competitive with the railroad. It is true that in the *Nashville case*, as exemplified by the portion of that opinion set forth at page 24 of the Commission's brief, that the Court there recognized that where *substantial hazard* is involved (i.e., "*a dangerous grade crossing*") a railroad may be compelled to make a substantial contribution. But the Commission's quotation omits any reference to the preceding portion of the Court's opinion, where stress is laid upon the absence of any specific liability on the part of the railroad to contribute to the promotion of public *convenience*. There the Court said, in language quoted at length

in our petition (at pages 22 and 23); and here repeated for ready reference:

[fol. 281] *"The promotion of public convenience will not justify requiring of a railroad, any more than of others, the expenditure of money,* unless it can be shown that a duty to provide the particular convenience rests upon it. Missouri P. R. Co. v. Nebraska, 164 U.S. 403, 41 L. ed. 489, 17 S. Ct. 130; Missouri P. R. Co. v. Nebraska, 217 US. 196, 54 L. ed. 727, 30 S. Ct. 461, 18 Ann. Cas. 989; Great Northern R. Co. v. Minnesota, 238 U.S. 340, 59 L. ed. 1337, 35 S. Ct. 753, P.U.R. 1915D, 701; Great Northern R. Co. v. Cahill, 253 U.S. 71, 64 L. ed. 787, 40 S. Ct. 457, 10 A.L.R. 1395, P.U.R. 1920E, 547. These were the authorities relied upon by this Court in Chicago, St. P. M. & O. R. Co. v. Holmberg, 282 U.S. 162, 167, 75 L. ed. 270, 273, 51 S. Ct. 56, where it held that to require a railroad to provide, at its own expense, an underpass, not primarily as a safety measure but for private convenience, was a denial of due process.

"It is true that the police power embraces regulations designed to promote public convenience or the general welfare, and not merely those in the interest of public health, safety and morals. Chicago, B. & Q. R. Co. v. Illinois, 200 U.S. 561, 592, 50 L. ed. 596, 609, 26 S. Ct. 341, 4 Ann. Cas. 1175. And it was stipulated that 'in the light of modern motor vehicular traffic anything which slows up that traffic is an inconvenience. *In other words, eliminating a grade crossing, as in the case at bar, facilitates the speed of motor vehicular traffic, in accordance with public demands.*' But when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured. Compare Hadacheck v. Sebastian, 239 U.S. 394, 60 L. ed. 348, 36 S. Ct. 148; Miller v. Schoene, 276 U.S. 272, 72 L. ed. 568, 48 S. Ct. 246. While moneys raised by general taxation may constitutionally be applied to purposes from which the individual taxed may receive no bene-

[fol. 282] fit, and indeed, suffer serious detriment; St. Louis & S. W. R. Co. v. Nattin, 277 U.S. 157, 159, 72 L. ed. 830, 831, 48 S. Ct. 438; Memphis & C. R. Co. v. Pace, 282 U.S. 241, 246, 75 L. ed. 315, 320, 51 S. Ct. 108, 72 A.L.R. 1096; *so-called assessments for public improvements laid upon particular property owners are ordinarily constitutional only if based on benefits received by them.* Myles Salt Co. v. Iberia & St. M. Drainage Dist. 239 U.S. 478, 60 L. ed. 392, 36 S. Ct. 204, L.R.A. 1918E, 190; Gast Realty & Invest. Co. v. Schneider Granite Co. 240 U.S. 55, 60 L. ed. 523, 36 S. Ct. 254; Kansas City S. R. Co. v. Road Improv. Dist. 256 U.S. 658, 65 L. ed. 1151, 41 S. Ct. 604." (Emphasis added).

The language above quoted immediately precedes the excerpt upon which the Commission relies; and of course these two portions of the opinion should be read together, in order that the effects of the *Nashville case,* in its relation to the earlier decisions, may be fully understood. In this connection, the reader should also bear in mind that in the case at bar, as in the *Nashville case,* there is no question of elimination of a *dangerous* grade crossing; the Commission's own showing demonstrates that here the hazard is so extremely slight as not to require any consideration. The sole essential purpose of the proposed construction, exemplified again and again in the testimony, in the Commission's opinion, and now in its answer, is to promote the rapid and uninterrupted movement of traffic using the roadway, including that which uses the nearby state highway.

[fol. 283] "The Burden on Interstate Commerce"

Answer, pages 26-30

In this portion of its answer the Commission attempts to meet our showing that the challenged order imposes a burden upon interstate commerce, in violation of the Commerce clause. Apparently the authors of the answer did not understand our contention fully, or review the Supreme Court's decisions upon which we rely; for they appear to

treat this case as if the burden were claimed to arise because of a discrimination in rates, or as if we were contending that the result of the order would be to deprive petitioner of a *fair return* upon its property. The burden here is the same character of direct financial burden which was imposed by the Arizona Train-Limit Law, and condemned in *Southern Pacific* v. *Arizona*, 325 U.S. 761, already cited. There a direct burden of expense was imposed upon this petitioner, and the other major Arizona railroad, by reason of compelled observance of a state statute. The Court declared that direct expense to be wholly disproportionate to any safety benefit which might result from the enforcement of the state regulation: holding that the challenged law, viewed as a safety measure, afforded slight and dubious advantage, if any; while, on the other hand, its undoubted effect on interstate commerce was not only to destroy necessary uniformity of regulation, but also to increase the cost of the railroad operations, and impair their efficiency. The additional cost, as shown by the opinion (p. 772) was approximately $1,000,000 a year for the two railroads involved; the findings by the trial court, adopted and approved by the Supreme Court (p. 771) having shown that the annual burden, upon this petitioner alone, was not less than about $400,000 per year, [fol. 284] based upon the year 1939. It was because of the financial burden thus imposed which, as the Court said, had a seriously adverse effect upon transportation efficiency and economy, while affording at most *slight* and *dubious* advantages as a safety measure, that the Arizona Law was held invalid under the Commerce Clause.

The situation is the same in the case at bar. Here, if the order is allowed to stand, petitioner will be subjected to an uncompensated capital expense of $628,260 equivalent, on an annual basis, to not less than $31,413 per year. It may be argued that this burden is insufficient to justify resort to the Commerce Clause; however, it should be noted that in *Kansas City Southern* v. *Kaw Valley Drainage District*, 233 U.S. 75, and *St. Louis & San Francisco Ry. Co.* v. *Public Service Comm.*, 254 U.S. 535, the financial burdens imposed by the challenged orders of the state authorities were apparently even smaller; yet in both cases the orders were

condemned under the Commerce Clause. In the *Kansas City Southern case* the Court further pointed out that the imposition of direct burdens upon interstate commerce was not to be avoided, by simply "invoking the convenient apologetics of the police power." This comment is particularly pertinent, in view of the Commission's repeated references to the police power, and its constant argument that that power is virtually absolute, and unaffected by constitutional restrictions.

In the light of the foregoing, it is obvious that the Commission's citations of Supreme Court decisions at pages 26, 27, and 28 of its answer are immaterial to the Commerce Clause point. These cases involved, generally speaking, either attempted state regulations of intrastate rates at lower than interstate levels, or attempts of the states to [fol. 285] compel the continuance of unprofitable local service, where it was claimed that the resulting losses would constitute burdens upon interstate commerce. In such cases considerations of discrimination against interstate commerce might be involved. The instant case involves no question of discrimination, but simply the imposition of a direct financial burden which, to paraphrase the language of the Court in the *Arizona case*, affords at most only slight and dubious advantage when viewed as a safety measure, but does on the other hand impose a real substantial burden upon petitioner as an instrumentality of interstate commerce.

We note also the Commission's assertion (p. 28) that the petitioner is here contending for a trial *de novo* of the instant case. This argument seems to make its appearance in every brief recently filed by the Commission in a review proceeding, whether or not it has any bearing upon the case before the Court. In Subdivision III of this Reply (pp. 88 to 97) we deal at length with this contention; here we shall merely point out that the petition does *not* seek a trial *de novo*, but instead asks specifically (p. 9) that the Commission be required to certify to this Court *its* entire *record* in the proceedings in which its challenged order was made, and that the Court review *that record*, and thereupon annul and set aside the Commission's decisions. In short, petitioner asks only for the relief contemplated by the precise

language of Section 1760 of the Public Utilities Code: i.e., that in cases such as this, where rights are asserted under the Constitution of the United States, this Court shall exercise its independent judgment on the law and the facts, and the findings and conclusions of the Commission material to the determination of the constitutional question shall not be final.

[fol. 286] "The Weight of Judicial Decision * * *

Clearly Supports the Findings * * * of the Commission"

Answer, pages 30-41

In this portion of its answer the Commission discusses at some length the four Supreme Court cases which are cited in its Decision No. 47344 (51 Cal. P.U.C. 771), as having laid down the rule which the Commission here proposes to follow: namely, that it "is not bound to accept the benefit principle." These cases are reviewed at length in our Petition (at pages 27 to 44) and have also been discussed, in passing, in our preceding references to the *Nashville case*.

We emphasize again that in each of these cases, the essence of the decision was that where a *dangerous* condition existed at a grade crossing, the rail carrier might properly be required to bear a substantial portion, perhaps even the full cost, of a separation, *if the separation were required in the interest of public safety*. This is precisely the view of these cases taken by the Court, at page 430 of the opinion in the *Nashville case*. Indeed, all these cases are cited at that passage of the *Nashville* opinion, in either the text or the footnotes.

But these cases, because of their very emphasis upon the *safety* aspect, and the necessity for the elimination of *hazard*, obviously can have no application here. At the risk of further repetition, we point again to the fact that the Commission's own showing indicates, on the basis of 25 years experience, that the mathematical likelihood that any motor vehicle using this crossing will be involved in a collision with a train is about 1 to 13 million: in other words, completely negligible. In a practical sense, the safety argument simply does not exist in this case.

[fol. 287] The Commission's citations in this portion of

its answer include, in addition to the four Supreme Court decisions referred to, a Missouri decision rendered in 1934; *State ex rel. Alton R. Co. v. Public Service Commission*, 70 S.W.2d 57. Apparently the Commission overlooked a decision by the same court two years later: *State ex rel. Wabash R. Co. v. Public Service Commission* (1936), 340 Mo. 225, 100 S.W.2d 522. In that case the Missouri Court said:

> "The City devoted a great portion of its brief to urging that the so called 'user basis' theory, or the theory of 'comparative use,' or of 'relative benefits' either to the railroads or the public, were not proper methods in arriving at a proper allocation of the cost. It insists that the extent to which the presence of the railroad at the point of crossing creates the danger and enhances the cost of elimination of the crossing is the proper basis upon which to apportion the cost. *That theory may be proper in certain cases, where the only purpose* of building a structure *is* a separation *for the purpose of eliminating a dangerous crossing.* The case under consideration, however, is peculiar in itself. Of all the cases cited in the briefs and in none that have come to our attention was there a situation, as we have here, presented to a commission or a court.
>
> "*Benefits which the various parties derived as the result of the project were of special importance in this case.*" (Emphasis added).

Thus like the Supreme Court of the United States, the Supreme Court of Missouri has affirmed the propriety of the benefit principle, particularly in cases where the safety element is not present or is relatively unimportant, and the special facts show that the expenditure would be for the primary benefit of others rather than the railroad.

[fol. 288] At pages 40 and 41 of the Answer, the Commission attempts to explain away its own action in approving and adopting the benefit principle in the *Goshen Junction case*, supra (38 C.R.C. 380). It will be noted that the Commission does not attempt to explain, and apparently cannot explain away, the *Alto case* of 1933 (38 C.R.C. 606, cited at pages 30 and 31 of our petition), or the long list of its orders approving and authorizing the apportionments of the costs

of grade separations, as between petitioner and its affiliated companies on the one hand, and the public authorities and other interested parties on the other, set forth in pages 92 to 97 of the appendix to the petition. It does include, at these pages, a portion, but only a portion, of its own Decision No. 29069, rendered in 1932 (and thus prior to the *Goshen Junction* case) and even emphasizes a portion of that quotation. However, a more extended quotation of the same opinion appears at page 67 of our petition; and we call attention to the following significant language from that decision now omitted by the Commission:

> *"There can be no question that the vehicular public will receive the greatest benefit from the widening of these separations, so it logically follows that this class of the public should bear the greater portion of the cost."* (Emphasis added).

In the case at bar the vehicular public will receive all but a very modest proportion of the benefit from the construction of the Los Feliz separation; and, to use the Commission's own phraseology, in a decision upon which it now purports to rely: "it logically follows that this class of the public should bear a greater portion of the cost." Certainly, to follow out the former thinking of the Commission still [fol. 289] further, the railroad should not have to bear any greater portion of the cost, than is justified *by the benefits* which it will realize.

"Presumption of Validity"

Answer, page 41

The Commission's argument that its decisions are supported by a strong presumption of validity is wholly meaningless in the case at bar, particularly in the light of the express provisions of Section 1760.

Moreover, since the Commission's findings on two vital points (the involvement of a state highway, and the formal mention of safety as one of the grounds supporting the necessity for the separation) are shown by its own answer to be contrary to the record and therefore erroneous, even

the *prima facie* presumption contended for in the argument is swept away.

The decisions cited by the Commission at this portion of its brief do not support the proposition that the Commission's determination carries any presumption of validity under the Federal constitution. There can be no presumption that the Commission, in the exercise of an asserted legislative function, has reached a correct legal decision upon questions of constitutional law.

"This Court May Not Substitute Its Judgment for That of the Commission"

Answer, pages 43-44

The argument under the foregoing caption is likewise beside the point at issue in this case. Petitioner's challenge is not addressed merely to an alleged erroneous exercise of *judgment* by the Commission; nor is it contended that on the facts the Court should substitute its discretion for that of [fol. 290] the Commission. It is contended, rather, that the Commission did not give any weight to the uncontested facts before it, and consequently did not observe constitutional requirements in arriving at its conclusions in its decision here under challenge. The question is as to the Commission's failure to observe express constitutional limitations: i.e., the prohibitions upon the deprivation of property without due process of law, and upon the imposition of direct and undue burdens upon interstate commerce implicit in the Commerce Clause. This Court is therefore not asked here to decide whether, in the circumstances, the Court would reach the same conclusions as the Commission or if not, what result it would reach; but rather to decide whether the Commission, *on the facts* as shown of record, may order the petitioner to pay out large sums of money for a facility which will bring about substantial benefits to others, but only relatively slight benefits to itself; and whether the Commission may, in so doing, impose a relatively heavy burden of expense upon a carrier's facilities employed in interstate commerce, where at best the improvement in safety will be slight and dubious.

"Petitioner's Alleged Interest in Highway Operations"

Answer, pages 47-50

In this portion of its brief the Commission repeats its reference to the petitioner's ownership of or interest in Pacific Motor Trucking Company, and other companies which operate motor vehicles upon the highways of this state. The Commission also makes the rather extravagant statement that petitioner operates or controls the largest and most important common-carrier motor-trucking stage-express and related services in the state, and therefore has [fol. 291] greater concern in the public highways than any other carrier.

While it is true that petitioner owns or entirely controls both Pacific Motor Trucking Company and Pacific Electric Railway Company, it has only a minority interest in Pacific Greyhound Lines, and Railway Express Agency, and does not control either. To that extent, the Commission's statement is quite erroneous. Insofar as any of these companies operate upon the highways of this state, they are, of course, required to pay the full scale of the fees, taxes, and other charges imposed upon highway motor carriers. Petitioner has no present objection to these impositions upon its subsidiaries, and would have no objection if they were increased, as a result of increases in all taxes, fees, and other charges of *all* motor carriers operating for hire or profit, to the point where all such motor carriers would pay amounts equivalent to the full value of the use which they make of the public highways. Included in such contributions from motor carriers, including *all* motor carriers whether owned by or affiliated with petitioner or not, should be whatever amounts are necessary to pay for the benefits received by them from highway improvements, including highway separations such as Los Feliz. In short, petitioner recognizes and urges that the benefit principle be applied to these motor carriers not solely with respect to grade separations, but with respect to *all* of the highway facilities they use. Consequently there is no inconsistency in petitioner's position that, *as a rail carrier*, it should not be called upon to contribute except in proportion to the benefit that it might realize. Far from being illogical in our contention, as

the Commission appears to argue (p. 48), we believe that [fol. 292] we are completely consistent in taking the position that all parties that may use and benefit from the Los Felix separation should participate in the cost accordingly. Our objection is to the imposition of charges or assessments upon petitioner's rail operations and services, which should be assessed against the truck, bus, and other motor vehicle operators (including its own subsidiaries) who are primarily benefited.

At page 49, the Commission recites some twelve alleged benefits which, according to its argument, will accrue to petitioner from the Los Felix separation and which, so the Commission says (Ans., p. 48), petitioner has "flatly refused to consider," although they were allegedly "obvious." In this connection, the Commission also refers to the "dangerous" Los Felix crossing: this in spite of the fact that its own evidence (cited in its Answer, at p. 12) shows that over a period of 25 years the so-called "danger" to automotive traffic has been virtually non-existent, because of the efficient protection afforded by the petitioner.

Of the twelve alleged benefits listed on page 49 of the answer, numbers 1, 5 and 6 relate to the alleged elimination of hazards on the tracks, causing accidents and personal injury suits, and serious damage to railroad equipment. The fact is that allowance for the benefits which might be realized from the elimination of accidents, including all expenses incident to such accidents where borne by the railroad, is included in the figures reflecting the benefits which the railroad will realize from the construction of the crossing. Specifically, the Commission's Exhibit 2, reproduced at pages 86 and following of the Appendix to our petition, contains a tabulation, reproduced on page 89 of [fol. 293] the Appendix, which shows the amounts paid out by the railroad on account of property damage over the 25 years and 3 months for which the accident record was studied. These figures entered into the average figure of accident and damage payments, amounting to $475 *per year*, shown in the tabulation at page 87; and this tabulation is also reproduced in the decision under attack. This figure includes, of course, payments to individuals on account of personal injuries, as well as payments on account

of property damage. This figure is a part of the total gross annual cost of $14,528, which would be eliminated as a railroad expense, if the separation were constructed. Thus items 1, 5 and 6 have been considered, and the financial benefit accruing therefrom has been included, in petitioner's (and the Commission's) calculation of its benefits, and petitioner's showing of the resulting proper contribution to be made by it. (Ex. 20; Appendix, p. 116)

Item 2 of the Commission's list relates to certain savings allegedly resulting from the relief from the operation of crossing gates. The amounts saved as a result of the discontinuance of the operation of crossing gates, including both the maintenance of the gates and the wages of the watchmen, is included in the item of $14,053, shown in the tabulations on pages 87 and 115-116 in the Appendix of our opening brief, and repeated in the challenged decision. See also pages 273-274 of the Reporter's Transcript, and Exhibits 2 and 20. As to switching operations, the evidence is uncontradicted that no saving would result (Rep. Tr., pp. 266, 411). Thus Item 2, to the extent that any benefit would be realized, is likewise included in the gross figure reflecting the financial benefits which petitioner will receive from the construction of the separation.

[fol. 294] Item 3, as listed by the Commission, is stated to be "improved drainage of right of way in the vicinity of the crossing, and relief of flood conditions at the depot grounds." The same contention is also made by the Cities (Cities' Br., p. 48).

An examination of the record (Rep. Tr., p. 317) will show that the evidence directly contradicts the Commission's claim, and demonstrates in fact that the construction of the separation would have no effect at all in improving the drainage of petitioner's right of way, or cause any reduction of alleged flood conditions at Glendale depot. In fact, flood conditions at the depot are seldom of serious consequence, and are already adequately taken care of.

Item 4 is the alleged easier accessibility of Glendale depot to patrons coming from the Hollywood area of Los Angeles. The evidence (Rep. Tr., pp. 321-322) shows that the proposed separation, instead of providing easier access to the depot, would make such access more difficult for

patrons coming from the Hollywood area. They would have more distance to travel, and would have to use more congested streets to the north and east of the depot, instead of using a roadway (Railroad Ave.) adjacent to the tracks east and south of the present Los Feliz crossing.

Item 7 of the Commission's list is stated to be "increased length of trains over the present 90 to 100 cars." The same item is also referred to in the Cities' Brief (at p. 44). Here again there is no showing that the existence of the present grade-crossing prevents the operation of trains longer than 90 to 100 cars, or that construction of the separation would permit such operation where it does not now take place. On the contrary, the evidence shows [fol. 295] that for other reasons, principally the maximum capacities of the passing tracks on the districts north and west of Los Feliz over which the trains must run, trains of more than 100 cars cannot readily be operated (Rep. Tr., pp. 243-244). Furthermore, even when the separation is built, there will still be several grade crossings within a short distance both east and west of Los Feliz; and if the presence of grade crossings can be said to have any influence upon the length of freight trains in this particular territory (which is at best exceedingly doubtful: Rep. Tr., pp. 250, 265-266), the elimination of only one of these cannot possibly have any material effect.

The 8th item on the Commission's list is alleged greater freedom, if not profit, in all switching operations. Here the evidence indicates (Rep. Tr., pp. 258, 268, 411) that the construction of the separation will not produce any economic savings in respect to switching operations, and that no tangible benefit can possibly result in this particular.

The 9th item in this list is the alleged opportunity for temporary storage of trains up to 90 cars in length. This item is also referred to by the Cities in their Brief (pp. 44-45). Here again the evidence not only fails to support the alleged benefit, but instead is squarely to the contrary (Rep. Tr., pp. 244-245, 247). In point of fact, there would be no occasion whatever for petitioner to store trains of this length in this particular location. It should be borne in mind that this is a double-track main line, with two short adjacent yard tracks which are in constant use. Trains

cannot be stored upon tracks which are in continual use for the movement of trains and cars. To do so would be to "tie the railroad up" completely on the two districts which [fol. 296] come together at Burbank Jct., a short distance north (west) of Los Feliz.

Item 10 is the alleged advantage of new structures and consequent longer life. The evidence shows that instead of being a monetary *advantage*, the presence and consequent necessary maintenance of the new and more elaborate structure would be a source of expense. Again the Commission's own Exhibit No. 2, in the tabulation reproduced at page 87 of the Appendix to our petition, and reproduced also in the decision under challenge, shows that the annual depreciation on the new structure would be $6921 per year, a charge which is not now incurred; and that the annual cost of maintenance, excluding of course the track which would be the same as at present, would be $1620. These will be added expenses, totaling $8611 per year, which must be offset (and in fact were offset by the Commission's own engineers) against the monetary savings accruing to petitioner, because of elimination of the crossing gates, crossing watchmen, and the slight annual expense assigned to accident damages at the crossing.

Numbers 11 and 12 of the Commission's list are, respectively, benefits from streets as "feeders" for this petitioner, and benefits from improved goodwill. These items are also cited in the Cities' Brief (at pp. 45-46, 48). There is no evidence that there will be any improvement in the streets which serve as feeders to this petitioner, except to the extent that Los Feliz itself will become an improved highway, over which motor traffic may move with less delay and less possibility of congestion. Other streets in the vicinity of Los Feliz will be to some extent obstructed (Rep. Tr., pp. 321-322). If these are the streets allegedly [fol. 297] serving as "feeders" for the petitioner, petitioner will be disadvantaged rather than otherwise. Actually there is no evidence whatever to show that any of the streets which may be affected by the separation serve as feeders for the petitioner, or that if they do the improvement will increase the petitioner's traffic.

As to the improved goodwill, there is no evidence what-

ever. Certainly it is highly questionable whether any substantial improvement of the public attitude toward the petitioner would result. Even assuming this to be true, however, the argument reduces to the contention that the petitioner can be compelled to spend $628,000 of its funds, to purchase the goodwill of the public as represented by the 27,000 or more motor vehicle operators who daily drive over the present crossing.

We cannot refrain from observing that the Commission's attempt to argue that these alleged benefits will be conferred upon petitioner represents a rather strange but, so far as petitioner is concerned, completely welcome (and correct) attitude on its part. In a sense, the Commission is again taking the same position which was taken by it over the long period between 1932 and 1951 when it accepted and applied the benefit principle, without exception, to all grade-separation proposals in which this petitioner was involved. In view of the Commission's attitude elsewhere in the answer it seems strange that it should try to justify its judgment, in the decision here under challenge, by citing the various alleged benefits which, as it contends, the petitioner will receive. We agree of course with the Commission's clear, though apparently reluctant, recognition that the consideration of benefits is of material importance, and [fol. 298] should be controlling. Accepting the principle, the only remaining question would be whether the benefits cited by the Commission on page 49 would in fact accrue, and if so, would justify the imposition upon the petitioner of one-half of the cost of the separation. Our analysis above shows that while some of them would accrue, they have already been taken into consideration in calculating the benefits which petitioner would receive and is willing to pay for; that others would not accrue, and that in fact no showing could be made to support such a contention.

But even if every one of these benefits could be realized, obviously the sum total of their value could not possibly approximate the expense sought to be imposed upon petitioner. The object and result of the separation would still be primarily to provide a better roadway for motor vehicles, and to promote their free and rapid movement, with greater freedom from delay, congestion and interference.

On this point the record is clear; and nothing stated by the Commission in either its decision, or now in its answer, argues in the least to the contrary.

We note the Commission's citation, at page 50 of the answer, of *City of Oakland* v. *Schenk*, 197 Cal. 456, to support the statement that the railroad has a continuing obligation to participate in the matter of constructing and maintaining *reasonable* and *adequate* crossings over its tracks. The decision was rendered by this Court in 1925, and involved merely the question of compensation to the railroad for a right of way or street which had been constructed across its tracks. The only issue was whether the railroad should be compensated for the incidental expense of filling between the tracks, and for two feet outside, and [fol. 299] for other crossing changes incidental to the building of the street. The Court said (at p. 463):

> "The duty resting on the railroad companies to make the necessary changes and improvements does not arise because of the opening of the street, but because of the obligation imposed through the exercise by the city of the power to order the crossing improved *whenever it becomes necessary for the protection of life and property.*" (Emphasis added).

This portion of the decision, particularly the italicized language, makes it clear that the obligation to participate in the construction or alteration of a crossing over a railroad company's tracks arises when changes are *necessary for the protection of life and property*. In the instant case, it cannot possibly be argued that the change is shown to be necessary for that reason. Certainly a gross expense of approximately $1,500,000, or the imposition upon the railroad of a direct contribution of nearly $750,000, could not possibly be justified for the purpose of eliminating accidents which have occurred on the average of about one in every twenty months, or personal injuries which have occurred on the average of about one in every thirty months. So far as *safety* of life and property is concerned, the protection now afforded at the Los Feliz crossing, by means of gates and crossing watchmen, is completely *reasonable* and *adequate*. The very use of these words ("reasonable," and

"adequate"), in the Commission's reference to the cited case, shows that the public authority is not vested with unrestrained discretion in imposing requirements upon the railroad company, but can only act within the limits implied by those descriptive words.

[fol. 300] "Petitioner * * * Has Gone Completely Outside the Record * * *"

Answer, pages 50-52

In this portion of its answer the Commission criticizes petitioner's reference to the study prepared by the Stanford Research Institute entitled, "The Railway-Highway Grade Crossing Problem"; asserting that the study was not in evidence in the record before the Commission, and that in making this reference petitioner "has gone far afield," and resorted to "borrowing outside railroad propaganda * * *." The Commission's intemperate criticisms are themselves sufficient warrant to justify the Court in making a close examination of the Stanford Research Institute study. Far from being merely "outside railroad propaganda," the study is a carefully prepared and comprehensive review of the entire problem, compiled by an independently supported and highly competent research organization, operating as we understand under the auspices of Stanford University. This study is available in a great number of public libraries, notably the San Francisco Public Library, and is entitled to the same respect, and authoritative force, as would be accorded to any other recognized work duly prepared by a body of experts, and freely available for the consultation of all who are concerned with the problem under review. It may be added that this study was not published and available when the hearing in this case took place, and hence could not have been included in the record.

We have quoted from the study, because we believe that the presentation of facts and conclusions therein is not only directly material (which of course the Commission does not question), but also cogent and persuasive on the very points with which this case is directly concerned. We have pre- [fol. 301] ferred to use quotation marks in presenting this material, in order not to be accused of plagiarizing. How-

ever, if there should be in the mind of the Court any infirmity in this particular, because the material is *quoted* rather than set forth as our own presentation, we have no hesitation in assuring the Court that we endorse, adopt, and reaffirm all of the material taken from the study, with the same effect as if it were of our own authorship.

The Commission likewise complains of our reference to General Administrative Memorandum No. 325 of the United States Bureau of Public Roads, apparently because likewise this document was not in evidence before it, in the original proceedings. Certainly Memorandum No. 325 can hardly be characterized as "outside railroad propaganda." It is a public document duly issued by a bureau of the Federal Government, pursuant to authority of a Federal statute. It is unquestionably a matter of judicial notice, which may properly be brought to this Court's attention for such value as it may have here. In this connection, it may be noted that the Cities of Los Angeles and Glendale, at page 39 of their brief, have quoted from Memorandum No. 325, and apparently find no grounds to criticize our own reference.

We have already noted the Commission's reference (p. 51 of the Answer) to the statement at page 37 of our petition, in which we discussed the Commission's admittedly erroneous finding (p. 795 of the decision; Appendix p. 32) that the proposed construction does not concern a state highway. We there suggested, and we now renew the suggestion, that this finding was made in the face of the positive testimony referred to by the Commission itself (at p. [fol. 302] 5 of its answer: i.e. the creation of the so-called "backlash" on Highway 99, San Fernando Road), so as to avoid any possibility that the State Department of Public Works might be called upon to contribute to the cost of the separation. This suggestion is entirely justified by the Commission's own statement, in the same sentence in which the erroneous finding is set forth, reading: "accordingly, the Department of Public Works of the State of California is not directly involved." We have also suggested, and we again renew the suggestion, that the sole and only purpose of this incorrect finding was to avoid any possibility that the railroad's contribution would be limited to the 10 per cent maximum provided by Administrative Memorandum

No. 325, because of the fact that a contribution by the State Highway Department would involve the possible use of Federal funds.

It will be noted that in its discussion at page 51 of its answer, the Commission, while asserting its alleged "indignation," *does not deny* that the finding was made in the face of positive and uncontradicted testimony, *does not deny* that it was for the purpose of avoiding any contribution by the Department of Public Works, and *does not deny* that the overall purpose was to avoid any possibility that Federal funds would be involved and its own imposition of expense upon petitioner thereby invalidated, to the extent that it is greater than 10 per cent.

On page 51, also, the Commission criticizes our reference to what it admits are "the relatively few accidents over the last 25 years," stating that we *imply* that the crossing is not potentially dangerous, and that our *implication* is "improper." Apparently the Commission does not fully under-[fol. 303] stand our position in this respect. We do not in the least mean merely to *imply* that the hazard of collisions between motor vehicles and trains at the crossing is slight; we assert that this is a positive fact, determined by practically a generation of actual experience. In this connection, moreover, we emphasize again that there is no actual claim that the construction of this separation is necessary in the interest of eliminating hazard, or because of any substantial danger at the crossing. While the word "safety" is used casually in the Commission's opinion, there is no actual finding that this separation is necessary for any definite reason grounded in safety. Nor does the Commission in its answer anywhere contend that safety considerations have any material bearing in the present case.

"Summary"

Answer, pages 52-55

In this portion of its answer the Commission undertakes to summarize in general language the preceding argument. Substantially all that is said in the summary which merits comment has already been discussed above, and further treatment would be largely repetitious. We note, however,

the citation of one additional case: *Pa. etc. Lines* v. *Board of Public Utility Commissioners* (1951), 81 A. (2d) 28, 33; 82 A. 2d 774. This case is cited to the proposition that a railroad, when accepting privileges granted in its charter, must be deemed to have taken into account expenses which might thereafter be incurred, by order of the Public Utilities Commission compelling the necessary installations for its *safe* operation at public highway crossings. Obviously the case has no application here. Petitioner has already provided all the installations needed in order to insure the [fol. 304] *safety* of automotive traffic at the Los Feliz crossing. As already stated, not even the Commission, despite its general tendency in its answer to use extravagant expressions, has had the temerity to argue that there is any actual and demonstrable hazard to motor vehicles at this crossing. The record of the past twenty-five years, contained in the Commission's own exhibit, is conclusive to the contrary.

We note, at the foot of page 55, two paragraphs which require additional comment. In the paragraph commencing on line 17 of this page, Petitioner is accused of being highly inconsistent, in disclaiming numerous benefits and advantages which would accrue to petitioner and its subsidiaries from the Los Feliz improvement. This is a complete and apparently gratuitous misrepresentation of our position. We have *acknowledged* (not disclaimed) the benefits which the record shows that petitioner would receive from the separation, and are prepared to contribute in proportion to those benefits. We have likewise acknowledged that the affiliated and subsidiary companies of the petitioner would, as highway users by motor vehicle, be benefited by the separation, and that they will participate in the expense, in the same manner, and to the same extent, as other motor-vehicle users of the roadway.

In the concluding paragraph, commencing on line 21 of page 55, the Commission refers to our petition as an "attack upon the existing laws and the Constitution of California" (which obviously it is not), and states that its purpose to "stymie, through prolonged and futile negotiations, any and all future grade separation relief and thereby escape any monetary or other payments whatsoever."

[fol. 305] As indicated, our petition is not an attack upon any existing statute or constitutional provision of this State, nor is it directed to any order of the Commission except the orders here in suit. It is not intended to have and need not have any effect of delaying the construction of the Los Feliz separation. Although our petition contains a general request for a stay of that portion of the order requiring the payment of money, we have not asked that the order be otherwise stayed, and particularly have not asked that the construction be delayed. In this connection it may be noted (as indicated at the outset of this Reply) that such a request was made, on behalf of the City of Glendale; and that that request was granted by the Commission without objection by petitioner, or indeed any expression on our part. So far as concerns our attitude generally toward grade-separation construction, reference may be had to the list of 108 grade-separation projects in which this company and its railroad subsidiaries participated, over the period 1933 to 1950, which appears on pages 92 to 97, inclusive (6 pages) of the Appendix to our petition.

Finally, we call attention to the express statement, in the Foreword to our brief supporting our petition (p. 14), to the effect that we have not opposed and do not presently oppose the construction of the Los Feliz separation; and to the further statement, in the conclusion (p. 94), that the issue here is not whether the separation should be built, but solely as to the allocation of the costs.

These attempts of the Commission to misrepresent petitioner's position and to attribute improper motives to petitioner appear in varying language in more than one passage of the Commission's answer. This technique might be [fol. 306] tolerated in a union election contest, or a waterfront rally; it might even be understood when employed on behalf of communist defendants in a criminal trial, where disrespect is often called upon to serve in place of evidence or argument; but it has no place in the sober consideration of constitutional questions such as presented here. It is particularly inappropriate that a constitutional body, such as the Public Utilities Commission, set up as the agency of the State of California and representing all of the various interests in this State, including the petitioner as one of

its major industries, should resort to the tactics here employed. In any event, and whatever the motives of the petitioner may have been, it is entitled like any other citizen to assert its constitutional rights before this Court, and to obtain from this Court a fair and reasonable adjudication of constitutional issues fully and fairly presented, without any question being raised as to its motives or purposes which may have impelled it to resort to its constitutional privilege.

"Conclusion"

Answer, pages 56-57

Here again the Commission resorts to a complete misrepresentation in order to support its argument. It refers first of all to our theory of this case as a "rail profits theory." Of course, this is merely the use of an epithet, there being apparently in the minds of the authors something wrongful or invidious in the very thought of "profits." However, the benefit principle is not simply a profit theory, but is a complete exemplification of the fundamental principle, declared in the due-process clauses of the [fol. 307] Federal and State constitutions, that a private individual cannot be *compelled* by the State to pay out his funds, except to the extent he may receive a fair consideration in return. Certainly the adoption of the benefit principle, in the present case, would not be a "perversion of grade-crossing regulation" as it exists and has existed in California. On the contrary, it would be merely a continuance of a consistent policy and practice which was initiated by the Commission as long ago as 1932, and has been followed ever since up to a recent date. It can hardly be said that a policy which was so uniformly followed, with such apparent and obvious concern for the public interest, and the interest of all private parties involved, was "a sham and a delusion." If so, not only this Commission, but the Congress of the United States, the Bureau of Public Roads, the Supreme Court of the United States in the *Nashville case*, and the public authorities of many of the other states, are all in the position of having labored under a delusion and operated under a sham for many years.

At page 57, the Commission again raises the purely fictitious issue that the petitioner is here seeking to "relitigate in the courts factual questions * * * herein determined by the Public Utilities Commission." The fact is that we are not seeking to relitigate this case at all, but only to have it determined by the Court, in accordance with Section 1760 of the Public Utilities Code, *upon the record made before the Commission;* furthermore, that there are no substantial issues of fact, except for the Commission's erroneous finding with respect to the involvement of a state highway, as to which the answer now apparently concedes that the Commission erred. This is a case in which the essential [fol. 308] basic *facts* are undisputed, and the only questions which arise are questions of law upon those facts. The Commission's attempt to characterize this case otherwise is completely without foundation.

"The Recent Action of This Court in S.F. 18671, December 11, 1952, The Atchison, Topeka and Santa Fe Railway Company v. Public Utilities Commission"

Answer, pages 57-58

At the very conclusion of its answer, the Commission refers to the action of this Court on December 11, 1952, denying the petition for writ of review in S. F. No. 18671, *The Atchison, Topeka and Santa Fe Railway Company* v. *Public Utilities Commission.* It is asserted that that action is decisive of the present case.

In No. 18671, the petitioner challenged the validity of the Commission's decision No. 47344, already discussed herein, which involved the widening of certain underpasses at the point where Washington Boulevard in Los Angeles crosses the main line and a branch line of the Santa Fe. That case differed from the case at bar in at least two important respects. In the first place, the proceeding involved the widening of existing underpasses, which had previously been constructed on a cooperative basis, with the railroad contributing a substantial portion of the expense. It may well have been that this Court simply regarded Decision No. 47344 as in furtherance of that individual pattern, and for

that reason concluded not to review the Commission's action.

In the second place, the Commission had found in Decision No. 47344 that the construction there involved was [fol. 309] primarily to meet local transportation needs, and thus by inference at least that no state highway was involved, even indirectly. In the present case, it is effectively shown, by undisputed evidence, and as already stated, in effect admitted by the Commission (p. 5 of its answer) that the proposed construction would have a direct and substantial effect upon traffic congestion upon the nearby state highway, and that one of the principal benefits of the separation would be the elimination of this congestion and consequent greater freedom of movement on the highway.

We consider that this Court's later action in S. F. No. 18667, *Southern Pacific Company* v. *Public Utilities Commission*, in which the Court, as of January 5, 1953, has granted the petition of this petitioner to review the Commission's decision No. 47161, is even more directly pertinent to the case at bar. In that case the challenged order purports to require petitioner to continue to operate a pair of mid-day trains between Oakland Pier and Sacramento, and to substitute Budd-diesel cars for the present steam-operated conventional locomotives and passenger cars; this in spite of a showing that the present operation entails an annual out-of-pocket loss of more than $100,000, due principally to lack of patronage, and that the diesel-car operation, in addition to involving an initial investment of $150,000 per car more, could not be expected to do more than reduce the out-of-pocket loss to about $20,000 per year. Essentially, that case involves the same fundamental question as the present case: namely, whether the Commission, in the exercise of its so called police power, and regardless of the limitations of the commerce and due-process clauses [fol. 310] of the Federal Constitution, may order a railroad carrier to expend large sums of money for which no compensating return by way of benefit or other consideration will be realized. Moreover, the Commission in that case presented substantially the same arguments as in the present case; including, in its answer to the petition, even some

of the same extravagantly critical language which appears in its present answer. Many of the sub-divisions of the Commission's answer in that case have been repeated in its answer in the present case, largely without any change of the language or the citation of cases relied upon. Compare, for example, sub-division II of the answer in that case, repeated at page 41 in the answer in the present case; sub-division III of that answer, repeated in substance at pages 41-43 of the answer in the present case; sub-division IV of that answer, repeated in substance at pages 26-28 of the answer in the present case; sub-division VII of that answer, repeated at pages 28-30 of the answer in the present case; and sub-division IX of that answer, repeated at pages 43-44 of the present answer. In view of the fact that the Commission has considered that the basic issues in these two cases are so nearly identical, which view we naturally share, we urge that the Court should take the same favorable action as in S. F. No. 18667, and should not feel bound by the denial entered in No. 18671, the *Santa Fe case*.

II

Reply to the Answer and Brief of the Cities of Los Angeles and Glendale

A. The answer and brief of the Cities, in the discussion of "Evidence" (Cities' Br. pp. 5-7) states:

> [fol. 311] "The evidence as summarized by petitioner in its brief (Petition, pp. 104-115) is quite comprehensive; however, certain additional evidence should be noted, and other evidence emphasized." (Cities' Brief, p. 5)

Petitioner submits that the Cities have not fairly commented on the evidence. Instances of improper comments or summarization by the Cities are as follows:

(1) It is stated in the Cities' Answer and Brief:

> "There was no evidence that vehicles using the street were in competition with the railroad." (Cities' Brief, p. 6)

The competitive nature of the Los Feliz traffic was pointed out at page 53 of the petition, with appropriate references to the evidence. This Court takes judicial notice of main lines of railroads, such as petitioner's (20 Am. Jur. 109-10, 23 Corp. Jur. 66; and cases cited) and the nature of the business, both passenger and freight, conducted thereon, as well as the competitive nature thereof (20 Am. Jur. 108-109; 23 Corp. Jur. 66; 31 Corp. Jur. Sec. 690-691; and cases cited). The evidence is that the vehicular traffic using Los Feliz goes to points served by petitioner (Rep. Tr., p. 30); that is, over highway routes competitive with petitioner. The uncontradicted evidence is that a substantial volume of vehicular traffic originating or terminating in the metropolitan area of Los Angeles uses Los Feliz en route to Antelope Valley and the Palm Springs area (Rep. Tr., p. 30, lines 9-18), both of which are served by petitioner's rail lines. Los Feliz is also used to reach U. S. Highway 99 (San Fernando Road) and State Route 40 leading to the [fol. 312] interior valleys (San Joaquin and Sacramento Valleys) in California (Rep. Tr., p. 30, lines 9-18), and the San Francisco Bay area, which are all places served by petitioners' rail lines. The incorrect and misleading statement of the Cities was apparently inserted in an effort to avoid any attempt to draw a parallel between this case and the *Walters (Nashville) case*, supra. Further, the Cities fail to mention "backlash" effect on traffic at the intersection of Los Feliz and San Fernando Road. This latter road, a major state highway, carries an enormous amount of truck traffic (Cities' Brief, p. 49) competitive with the railroad; and the "backlash" directly affects and impedes that traffic. (P.U.C. Answer, p. 5). The proposed grade separation will relieve the backlash and congestion on San Fernando Road (P.U.C. Answer, p. 5).

(2) Another incorrect statement is:

> "The number of train movements has materially increased in the last fifteen years." (Cities' Brief, p. 6)

The transcript reference was given as page 71. At that passage the Planning Commissioner of Glendale testified that *at Goodwin Avenue*, the *next* crossing, there were *in 1936* 24 train movements per day, as compared with 69 or

70 train movements per day *at Los Feliz in 1951.* There was no evidence of the number of movements per day in 1951 at Goodwin Avenue, or the number of movements at Los Feliz in 1936. On cross-examination the witness admitted the Goodwin Avenue crossing was not comparable with Los Feliz; and said:

"Q. Where is Goodwin Avenue in relation to Los Feliz?

[fol. 313] A. Northwesterly.

Q. How far?

A. I would not know the exact distance. I would say it is over a half mile.

Q. You have made no check to compare switching movements on Goodwin Avenue and switching movements on Los Feliz, did you?

A. No. I think it is obvious that the amount of switching movement at Los Feliz is not the same as Goodwin Avenue.

Q. You do not know?

A. I definitely know.

Q. What is the difference?

A. The difference is practically no switching movement at Goodwin Avenue as compared on Los Feliz.

Q. In other words, there are a lot of switching movements at Los Feliz?

A. Yes.

Q. So there would be more train movement at Los Feliz than at Goodwin at any particular year?

A. I would assume so.

Q. So, using the Goodwin Crossing report is not comparable with Los Feliz; is that right?

A. I think if you want through trains for through trains, that statement in the report will give us something on which we can base what the through train movement is today, and I think anybody will admit that with a doubling of the population of the metropolitan area, the Southern Pacific's business of through trains has increased a little.

Q. You do not know?

A. I do not know until I have checked the record, but I am putting it in the record for that purpose."

(Rep. Tr., pp. 107-108)

[fol. 314] Further, the switching movements at Los Feliz have been static for many years (Rep. Tr., pp. 245-246, 262).

(3) The following statement is likewise misleading: "and the length of freight trains has been drastically increased during the lives of some of the Railroad's personnel." (Cities' Brief, p. 7)

The transcript reference was given at page 256. The Superintendent of the Petitioner was testifying, a man of some 49 years railroad experience (Rep. Tr., p. 241. He said:

"Q. 25 years ago did you run 90-car trains and 100-car trains as a regular rule, or wasn't it nearer 80?

A. Going back 25 years ago, I would say 75, 80 cars to a train was a pretty good sized train.

Q. That was a long train at that time?

A. Yes. When I was a brakeman, a 35-car train was a big train. That takes you back a long ways.

Q. The length of trains, then, have been gradually increasing over the years?

A. Oh, absolutely; sure, certainly. As I said before, and I want to repeat, that 100 cars is the maximum number of cars that we operate in any one freight train." (Rep. Tr., pp. 256-257)

It is to be noted that these references are to maximum train lengths ("good-sized," or "big" trains), not to averages (Rep. Tr., pp. 253-254 and 256). Further, at Los Feliz most of the "trains" are actually switching movements with relatively few cars (Rep. Tr., pp. 107-108, and 406 and following).

(4) Another statement which gives a false impression is: "The backlash occurs * * * upon the railroad tracks * * *." (Cities' Brief, p. 7)

[fol. 315] The transcript reference was given as page 197. On this topic of "backlash" on the tracks, the testimony shows:

"Q. With this increasing volume of traffic, isn't it more likely or very likely that there will be increasing occasions when backlash will also affect the railroad crossing?

A. No. I do not think so, because we hold our trains back there. They are coming in slow, anyway, and it is possible to hold them back so that they do not reach the crossing.

* * * * * * *

Q. If the backlash should occur more frequently in the future, isn't it very likely that on the occasion of one of those backlashes that there will be an accident, which would make the $475 per year claims——

A. No, I do not.

Q. ——very small?

A. Pardon me. I do not, for the reason that the gates in the future would perform the same use as they do now, and that is to cut the vehicles off. That tower man can see what the condition is up towards San Fernando Road, and also looking toward Riverside Drive. He can use his judgment in getting that gate down there, if he has an approaching train, to avoid that very thing of an accumulation of traffic on the crossing. So, I do not think that that condition would be changed at all as long as the gates are in there." (Rep. Tr., pp. 315-317)

and

"Q. In your estimate, did you include any sum representing possible or probable increase in damage claims during future years if the underpass is not constructed?

A. We did not, because we had so very few records in there that the past experience was considered to be [fol. 316] comparable with the future because of the very limited number of accidents. The principal trouble we have had in there is the breaking of the gates." (Rep. Tr., p. 314)

B. Point I of the Cities' answer and brief (pp. 8-10), relating to the Commission's power and duty to apportion costs, adds nothing to the discussion of the problems in question other than cite the Constitution of California, a code section, and a decision of the Commission in another matter.

C. Point II of the Cities' answer and brief (pp. 11-21) asserts in substance that the Commission can require a railroad to pay the entire cost of a grade separation. There are cited and discussed six decisions of the Supreme Court of the United States dealing with grade separations and particularly with cost allocations. All the cases thus cited were decided prior to the *Walters (Nashville)* case *(Nashville, C. & St. L. R. Co. v. Walters*, 294 U. S. 405). Four of the six cases cited, *Chi., Mil. & St. P. Ry. v. Minneapolis* (1914), 232 U. S. 430, 58 L. Ed. 671; *Mo. Pac. Ry. v. Omaha* (1914), 235 U. S. 121, 59 L. Ed. 157; *Erie Railroad Co. v. Board of Public Utility Comrs.* (1920), 254 U. S. 394, 65 L. Ed. 322; and *Lehigh Valley R. R. v. Commissioners* (1928), 278 U. S. 24, 73 L. Ed. 161, were analyzed in the petition (pp. 38-43), and are there shown to be inapplicable to the essential issues in the present case. The other two (*Cincinnati, I. & W. Ry. v. Connersville* (1910), 218 U. S. 336; and *Northern Pacific Railway v. Duluth* (1908), 208 U. S. 583) are even earlier than the four which we have analyzed, and thus even less relevant to the issues presented here.

The *Nashville* case, or, as referred to by petitioner, the *Walters case* is discussed by the Cities at p. 26 and following of their answer and brief. The Commission also discusses [fol. 317] this case at length in its answer (at pp. 19-25). In the preceding subdivision hereof in which we reply to the Commission's answer, we have reviewed the *Nashville case* again (*ante*, pp. 28-30), in the light of the Commission's comments, and that discussion will also serve as our reply to the Cities' argument.

Obviously no weight can be given to the older cases, decided before the *Walters* case, for that decision, as we have shown, marked a recognition of the changed circumstances in this particular field, and gave impetus and express approval to the principle of apportionment on the basis of benefits, as opposed to mere arbitrary action such as ex-

supplied by the decision here under challenge. The arbitrary result of the Supreme Court's new approach is shown by the decision in the *Village of Spencer* case, *supra* (5 N.Y.2d 94, 99; 154 App. Div. 412), wherein the Court stated:

"Furthermore, the imposition of such financial burden upon the railroad must bear some reasonable relation to the evils to be ameliorated or the advantages to be secured. It is not sufficient to justify the imposition of such financial burden upon the railroad to show that public convenience will be promoted, but there must be some reasonable relation between the improvement and the promotion of public safety. *Nashville, C. & St. L. Ry. v. Walters, supra.*"

D. Point III of the Cities' answer and brief (pp. 22-40) contends (in phraseology similar to that employed by the Commission) that there is an "logical or legal basis" for the "grandfather principle." Two groups of cases are cited. The first group again includes only cases decided before the *Walters* case. These cases are:

State v. Public Service Commission of Missouri (Mo., 1936), 92 S. W. (2d) 101 (p. 34);

[2d 315] *Erie Railroad Co. v. Board of Public Utility Comrs.* (1930), 254 U. S. 394, 413, 65 L. Ed. 322, 335 (pp. 37-38 and 39);

Application of the City of Los Angeles (1932), 37 C.R.C. 783, 787 (p. 38).

To the above should be added *In Re New York C. & W. Ry. Co.* (1933), 260 N.Y.S. 174 (cited at p. 37), which, although decided shortly after the *Walters* case, obviously was decided without reference to, or knowledge of, the doctrine of the *Walters* decision, since the latter is not cited in the opinion.

It is particularly interesting to note that the Cities refer (p. 38) to the decision in *Application of the City of Los Angeles* (1932), 37 C.R.C. 784, 787. As already stated (*ante*, p. 56) that decision involved a proposal to widen underpasses. The proposal was approved, but the order

was never carried out. However, as we have emphasized in Part I hereof (at p. 36), in that opinion the Commission said:

> "There can be no question that *the vehicular public will receive the greatest benefit from the widening* of these separations, *so it logically follows that this class* of the public *should bear the greater portion* of the cost."

In spite of this clear recognition of the benefit principle, the decision is cited nevertheless as authority for the Cities' contention that there is no logical or legal basis for the apportionment of the costs of the proposed separation to the parties respectively in accordance with the benefits to be received by them. Apparently the Cities' representatives have not recently reviewed the litigation in which they or their predecessors took part some twenty years ago. [fol. 319] The second group of cases cited by the Cities includes a number of cases decided since 1935, when the *Welters* decision was rendered. The first of these is *State v. Public Service Commission of Missouri* (Mo., 1936), 340 Mo. 225, 100 S. W. 2d 522, 109 A.L.R. 754 (p. 22). We have already pointed out (*ante*, p. 35) that in that case the Court said (100 S. W. 2d at p. 530):

> "The City devoted a great portion of its brief to urging that the so called 'user basis' theory, or the theory of 'comparative use,' or of 'relative benefits' either to the railroads or the public, were not proper methods in arriving at a proper allocation of the cost. It insists that the extent to which the presence of the railroad at the point of crossing creates the danger and enhances the cost of elimination of the crossing is the proper basis upon which to apportion the cost. *That theory may be proper in certain cases, where the only purpose* of building a structure is a separation *for the purpose of eliminating a dangerous crossing.* The case under consideration, however, is peculiar in itself. Of all the cases cited in the briefs and in none that have come to our attention was there a situation, as we have here, presented to a commission or a court. • • •

> "Benefits which the various parties derived as the result of the project were of special importance in this case."

Thus the decision, far from rejecting or denouncing the benefit principle, appears to have accorded substantial weight to the benefits accruing to the parties.

In *Lehigh and New England R. Co.* v. *Public Service Com'n* (1937), 126 Pa. Super. 565, 191 A. 380, 383 (p. 25), [fol. 330] the Court was careful to state in a case involving the reconstruction of a crossing:

> "Those provisions of the Public Service Company Law which are applicable were enacted by virtue of the police power of the state; and, as we said in Wilkes-Barre Railway Corporation v. Public Service Comm. et al., 125 Pa. Super. 362, at page 368, 188 A. 546, at page 548, 'the lawful exercise of the police power might take place any time and the parties concerned be required to pay their proper share.' This, however, is subject to the constitutional limitation that it may not be exerted arbitrarily or unreasonably. Nashville, Chattanooga & St. Louis Railway v. Walters et al., 294 U. S. 405, 55 S. Ct. 486, 79 L. Ed. 949."

In *Lyford* v. *State of New York* (1944), 140 F. 2d 840 (p. 35), the Court simply relied upon *Erie Railroad Co.* v. *Board of Public Utility Comrs., supra,* and a New York constitutional provision. The *Walters case* was not discussed or even mentioned. In view of this omission, it is difficult to believe that the case can be regarded as authoritative. The companion case of *State of New York* v. *Gebhardt* (1945), 151 F. 2d 802 (p. 37), is of no assistance, since the Court did not discuss either the benefit principle, nor the apportionment of costs on any other basis.

The other case cited by the Cities is *In re Elimination of Highway-Railroad Crossings* (1937), 299 N.Y.S. 693 (p. 37). The opinion therein states (pp. 701-2):

> "The order of the commission, however, must be reasonable, when viewed in the light of the surrounding circumstances, or it will be considered arbitrary and

> oppressive, and will not be permitted to stand. The police power of the State is subject to the constitutional [fol. 321] limitation that it may not be exercised capriciously or unreasonably. Nashville, Chattanooga & St. Louis Ry. v. Walters, 294 U. S. 405, 55 S. Ct. 486, 79 L. Ed. 949."

The New York decisions should be read in the light of the *Village of Spencer case, supra,* in which, as already noted, the railroad is shown as having contended (5 N.Y.S., p. 949):

> "The argument of the appellant is that the promotion of safety is no longer the main purpose of grade crossings elimination, but that the emphasis has changed so that the main purpose now is the furtherance of an uninterrupted rapid movement by motor vehicles irrespective of the question whether public safety requires such improvement."

and the Court responded (p. 950):

> "Furthermore, the imposition of such financial burden upon the railroad must bear some reasonable relation to the evils to be eradicated or the advantages to be secured; it is not sufficient to justify the imposition of such financial burden upon the railroad to show that public convenience will be promoted, but there must be some reasonable relation between the improvement and the promotion of public safety. Nashville, C. & St. L. Ry. v. Walters, supra."

E. In Point IV, at page 41 of the Cities' answer and brief, there appears Subdivision A captioned "General Principle to Be Used in Determining Benefits Received by Railroad." The subject matter constitutes a presentation of the Cities' so-called "barrier theory": i.e., that the railroad obstructs the roadway, and therefore should pay all the costs of the grade separation required to remove the barrier [fol. 322] created by the presence of the railroad tracks. This theory is unrealistic, unreasonable, and legally indefensible.

(1) The Cities argue that the railroads seem to have been given some special consideration at crossings, and that

> "if the railroad would operate in the same manner as other traffic and comply with the laws of the road applicable to other traffic, this special burden would of course not be assessed against the railroads." (Cities' Brief, p. 48)

The Cities' argument takes no account of actualities. Traffic is what? Does it consist of automobiles only? Of course not. Even a brief examination of the Vehicle Code and municipal ordinances discloses there are many separate and unlike groups. There are pedestrians, horses and livestock, automobiles, trucks, busses, farm equipment, housemovers, street cars, railroad cars and trains, etc. The "laws of the road" are not uniform in application to each group. Affecting railroads, there are municipal ordinances, the Public Utilities Act, the orders of the Public Utilities Commission, etc. Railroads, like everyone else, certainly obey the "laws of the road."

(2) It is to be remembered that the railroad was first in the area, in point of time (Rep. Tr., pp. 225-226, 233), that Los Feliz was opened across the railroad at a later date. The formal highway easements granted to the City of Glendale provided:

> "This grant (to the City by the Railroad) is subject and subordinate to the prior and continuing right and obligation of the first party (the railroad) to use and maintain its entire railroad right of way and property in performance of its public duty as a common carrier." (Exs. 13, 14 and 15)

[fol. 323] The railroad's titles to its land are property rights, which the petitioner is entitled to have protected under the state and federal constitutions. In fact, the Courts have always recognized that the railroads are part of the great highways of the country. It must be remembered the Cities' right to open a street across a railroad, under the police power, is not the same thing as the power of the public to require *by subsequent proceedings,* that the highway be made *safe.*

The leading case that draws this distinction is *City of Oakland* v. *Schenck* (1925), 197 Cal. 456, 241 Pac. 545, where the railroad appealed from a judgment granting the nominal sum of $1.00 for railroad lands condemned by the City of Oakland. This case has already been discussed briefly at pp. 46-47 of this reply, in connection with its citation by the Commission at page 50 of its answer. Concerning the railroad's property rights, this Court said:

> "It may not be questioned that a railroad's right of way is so far private property as to be entitled to protection of the constitution, so that it can only be taken under the power of eminent domain; and a condition precedent to the exercise of that power is that the statute conferring it make provision for reasonably compensating the owner. (*Western Union Tel. Co.* v. *Pennsylvania R. R. Co.*, 195 U. S. 540, 570 [1 Ann. Cas. 517, 49 L. Ed. 312, 25 Sup. Ct. Rep. 133, see also Rose's U. S. Notes].) The interest appropriated by the party condemning may be small, and the amount of compensation difficult of proper measurement, but some award should be made, however small the amount may be. • • • *If the opening of the street across the railroad tracks in this case does not unduly interfere with the companies' use for legitimate railroad purposes, then their compensation should be nominal.* (P. 460.) *If, prior to* [fol. 324] *the institution of the condemnation proceedings, the railroad companies had constructed upon the land embraced within the crossing buildings to be used in their business, it would have been necessary, in ascertaining the just compensation to be awarded, to take into consideration the value of such improvements.* (P. 461.) Appellants cannot recover for such costs. The expenses that will be incurred by the railroad companies in making structural changes such as filling the portion of the tracks between the rails, and two feet outside, with planks, and other crossing changes, in order that the railroad may be safely operated, necessarily result from the maintenance of a public highway, under legislative sanction, and must be deemed to have been taken into account by the railroad companies when

> they accepted the privileges and franchises granted by the state. *Such expenses must be regarded as incidental to the police power of the state.* (P. 462.) The acquisition by eminent domain of an easement for street purposes by a municipality is one thing. *The power of the public to require, by subsequent proceedings, that its highways be made safe is another.* * * * The duty resting on the railroad companies to make the necessary changes and improvements does not arise because of the opening of the street, but because of the obligation imposed through the exercise by the city of the power to order the crossing improved *whenever it becomes necessary for the protection of life and property.*" (P. 463.) (Emphasis added.)

Further defining the property rights held by a railroad in California, the Court stated:

> "In this state there is no such restriction on the right of a railroad company. It may acquire the fee in land by direct purchase, although it may obtain only an ease-[fol. 325] ment for railroad purposes if it resort to proceedings in eminent domain." (P. 466.)

Even the fact that the railroad may, regardless of its property rights, acquire a franchise right to cross the street from the City in no way estops the railroad from claiming all of its constitutional rights incident to property ownership. (*City of San Diego* v. *Southern Cal. Tel. Co.* (1949), 92 Cal. App. 2d 793, 808, 208 P. 2d 27, and *Ocean Park etc. Corp.* v. *Santa Monica* (1940), 40 Cal. App. 2d 76, 104 P. 2d 668.)

We therefore come back to the incontrovertible proposition that, as the Cities say: "The instant case represents an exercise of the police power." The railroad is entitled to assert its rights incident to property ownership. The railroad may not be charged and its property may not be taken under the police power, or under the theory of *damnum absque injuria*, except upon reasonable application of the police power, taking into consideration such factors as which party introduced the danger; and any assessment of

costs upon the railroad must have a substantial relation to the *purpose to be accomplished.*

In other words, the fact that the City holds an easement for street purposes is something very different from the right to require the railroad to participate in the *cost* of the separation, which can be done *only* when public *safety* is actually and substantially involved.

In was further pointed out in *Black* v. *Southern Pacific* (1932), 124 Cal. App. 321, 331, 12 P. 2d 981, 985:

> "But it is well settled that a railroad right of way is so far private property as to be entitled to the protection of the Constitution, and that it can only be taken without its consent under the power of eminent domain, [fol. 326] a condition precedent to such taking being that provision be made for reasonable compensation to the company."

Thus the conclusion to be reached is that where *public safety is not involved*, there is no duty on the railroad to expend any of its funds for any portion of the costs of grade separations. (Compare *Northwestern Pac. R. R. Co.* v. *Superior Court* (1949), 34 Cal. 2d 454, 211 P. 2d 571, holding that a municipality may not interfere with the railroad use of property owned by the railroad even though it pays adequate compensation in condemnation proceedings and then only subject to the orders of the Public Utilities Commission.)

(3) The railroad is, of course, a quasi-public corporation. Its lines are devoted to the public use and because of its status it is required to accept the regulation of public authority, but it is, nonetheless, a private owner of property. Petitioner's position in respect to the barrier theory advanced by the Cities is simply this, that besides having the usual rights of a private owner of property, its rail lines fulfill a public need the same as the streets. The railroads give a *quid pro quo* in service to the public at large, in return for their right, based on public need and practical necessity, to operate trains without normally stopping at traffic signals, and to cross streets, highways, and rivers, etc.

(4) It is also asserted in Point IV of the Cities' answer and brief (pp. 41-48) that the benefit principle as advocated by petitioner does not include the calculation of certain allegedly "obvious" benefits. The Commission has followed the lead of the Cities, and advanced the same contentions; [fol. 327] and therefore, for convenience, these contentions have been discussed in their entirety at pages 40 to 46 hereof, *ante*.

F. Point V of the Cities' answer and brief (pp. 49-52) asserts that the Orders of the Commission constitute a justified and reasonable exercise of the police power. These arguments apparently are set forth in the hope, that, somehow or another, this Court may be induced to believe that public *safety* is materially involved. The argument fails to discuss so-called public *convenience* (i.e., convenience of motor vehicle traffic) in its relation to the apportioning of costs. Much of this same argument is presented by the Commission, and for convenience these arguments have been discussed in one place, at pp. 34 to 37, *ante*.

G. In the answer and brief of the Cities (as well as in the Commission's answer) the attempt is made to justify the allocation of one-half of the costs of the separation to petitioner as a valid exercise of *police power*, and as *damnum absque injuria*. Since petitioner believes that the fundamental and primary question before the Court is whether or not the Commission's order is a constitutional exercise of the *police power* (*Nashville, etc.* v. *Walters, supra*) it is desirable again to review the basic characteristics of the police power, and the constitutional limitations thereon. We therefore set forth below the essential characteristics of the police power, as involved in this case:

1. Petitioner is a railroad corporation carrying on its business in California, and claims the protection of the Commerce clause (Art. I, Sect. 8, par. 3) of, and the due-process clause of the Fourteenth Amendment to the United States Constitution, and Article I, Sections 13 and 14, of [fol. 328] the California Constitution, against the application of state authority, delegated to the Public Utilities Commission, in the same way that an individual might claim that protection. A title to land in fee simple or an ease-

ment in land owned by the railroad is a property right protected by both Constitutions.

Connecticut General Life Ins. Co. v. *Johnson*, 303 U. S. 77, 82 L. Ed. 673, reversing 67 P. 2d 675, 8 Cal. 2d 624 (1937);

Los Angeles Railway Corporation v. *Railroad Commission of California*, 29 F. 2d 140, aff'd, 280 U. S. 145, 74 L. Ed. 234;

Merced Dredging Co. v. *Merced County*, 67 Fed. Supp. 598.

It has already been pointed out (*ante*, p. 70) that the railroad was the first in the area in point of time (Rep. Tr., pp. 225-226 and 238), and that Los Feliz road was opened across the railroad at a later date.

2. The due process clause of the Fourteenth Amendment requires that State action shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation *to the object sought to be attained.*

Merced Dredging Co. v. *Merced County*, *supra*, p. 606.

3. The police power of the State may not be invoked to satisfy a mere public wish or desire, or demands founded upon aesthetic or sentimental considerations, but only to protect essential public interests.

Merced Dredging Co. v. *Merced County*, *supra*, p. 607.

[fol. 329] 4. The police power may be invoked in derogation of property rights only when founded upon valid and substantial considerations relative to the health, the morals, or the safety of the public. In *Hart* v. *City of Beverly Hills* (1938), 11 Cal. 2d 343, 345, this Court stated:

"By judicial determination, evidenced by many legal precedents, the principle of law is thoroughly established, that the constitutional rights of the individual to acquire and to possess property includes the right to dispose of it * * * excepting only in that regard, that the exercise of the police power may be invoked in

derogation thereof when it is founded upon valid and substantial considerations relative to the health, the morals, the safety or the 'general welfare' of the public."

At page 346 this Court said:

"Covering a period of decades, the exercise of the police power was limited to conditions wherein either the health, the morals, or the safety of the general public was seriously and unquestionably involved. As long as any or either of such requirements were or was respectively maintained, personal liberties were not seriously endangered,—but not so, necessarily, upon the advent of the addition of the element of 'general welfare' to those constituents which theretofore solely had constituted a justifiable excuse of warranty for the destruction of natural rights. It is obvious that in its liberal and untrammeled construction, 'general welfare' has an infinite range,—nearly, if not as completely beyond the contemplation of the human mind as is the universe itself. * * *

"Thus, if the meaning of the words 'general welfare' be accorded their utmost significance, the original 'due process' protector of human rights may be so endan- [fol. 330] gered by the attacks made thereon by the 'police power' destroyer that considering present legislative tendencies, within the lives of those now in being, if utter annihilation of the substance of constitutional guaranties do not ensue, no more than a shadow ultimately may remain. * * * But such results may ensue only in the absence of conservative and conscientious judicial construction and interpretation of legislative acts. As hereinbefore has been indicated, it should be noted that the words 'general welfare' have been grafted upon the original stock of 'health, morals and safety,' with the resulting incident that they must be interpreted in accord with the rule that requires that when words of a general character follow those of special meaning the former must be governed in their significance by that which inheres in the latter. Otherwise stated, in the construction of a statute, special words

employed wherein are the guiding, if not the controlling force as regards general and succeeding words (citing authorities). With such reversion to legal principles of statutory construction, their application to the instant situation must result in the conclusion that the inclusion of the words 'general welfare' as an element either essential, or which may be relied upon as affording a justification for that which otherwise properly might be termed a violation of the personal rights of the individual, has the effect only of enlarging or expanding the significance that formerly was deemed properly attachable to the grounds originally deemed necessary to the expedient exercise of the police power of the State."

The ruling of this Court in the cited opinion requires, therefore, that any legislative act in this state in order to be valid, in the face of a challenge on constitutional grounds, must bear a reasonable relation to *public health*, *safety* or *morals*.

[fol. 331] 5. In *Kansas City Southern Ry. Co.* v. *Kaw Valley Drainage District*, supra, the Court held that direct interference with and regulation of a subject matter committed by the Constitution to the exclusive control of Congress could not be avoided by the State,

"by simply invoking *the convenient apologetics of the police power*. It repeatedly has been said or implied that a direct interference with commerce among the States could not be justified in this way. 'The state can do nothing which will directly burden or impede the interstate traffic of the company, or impair the usefulness of its facilities for such traffic.' (Citing cases) • • • Furthermore *in the present case it is not pretended that local welfare needs the removal of the defendants' bridges* at the expense of the dominant requirements of commerce with other states, *but merely that it would be helped by raising them*. The fact that the court cannot order them to be raised does not justify a judgment that they be destroyed even in the avowed expectation that what it wants but cannot command is all that will come to pass." (Emphasis added).

As expressed by the Court in the *Nashville case* (294 U. S., at p. 415):

> "A statute valid as to one set of facts may be invalid as to another. A statute valid when enacted may become invalid by change in the conditions to which it is applied. The police power is subject to the constitutional limitation that it may not be executed arbitrarily or unreasonably."

At pages 428-49 the Court further stated (in language already referred to):

> "The promotion of public convenience will not justify requiring of a railroad, any more than of others, the ex- [fol. 332] penditure of money, unless it can be shown that a duty to provide the particular convenience rests upon it. *Missouri Pacific Ry.* v. *Nebraska*, 164 U. S. 403; *Missouri Pacific Ry.* v. *Nebraska*, 217 U. S. 196; *Great Northern Ry.* v. *Minnesota*, 238 U. S. 340; *Great Northern Ry.* v. *Cahill*, 253 U. S. 71. These were the authorities relied upon by this Court in *Chicago, St. P., M. & O. Ry.* v. *Holmberg*, 262 U. S. 162, 167, where it held that *to require a railroad to provide, at its own expense, an underpass, not primarily as a safety measure but for private convenience, was a denial of due process.*
>
> "It is true that the police power embraces regulations designed to promote public convenience or the general welfare, and not merely those in the interest of public health, safety and morals. *Chicago, B. & Q. R. Co.* v. *Illinois ex rel. Drainage Commissioners*, 200 U. S. 561, 592. And it was stipulated that 'in the light of modern motor vehicular traffic anything which slows up that traffic is an inconvenience. In other words, eliminating a grade crossing, as in the case at bar, facilitates the speed of motor vehicular traffic, in accordance with public demands.' But *when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured.* Compare *Hadacheck* v. *Los An-*

geles, 239 U. S. 394; *Miller* v. *Schoene*, 276 U. S. 272. While moneys raised by general taxation may constitutionally be applied to purposes from which the individual taxed may receive no benefit, and indeed, suffer serious detriment; *St. Louis & Southwestern Ry.* v. *Nattin*, 277 U. S. 157, 159; *Memphis & Charleston Ry.* v. *Pace*, 282 U. S. 241, 246; so-called *assessments for public improvements* laid upon particular property owners *are ordinarily constitutional only if based on benefits received by them.*" (Emphasis added).

[fol. 333] 6. In *House* v. *L. A. County Flood Control Dist.* (1944), 25 Cal. 2d 384, 153 P. 2d 950, plaintiff set forth that defendant had removed safe and secure protection adjacent to her land and substituted therefor an unsafe bank resulting in the inundation of her property. Reversing the judgment of dismissal after the lower court sustained a demurrer to the complaint, this Court had the following to say regarding police power (at p. 388):

"Accepting the premise of argument of the parties here that a levee improvement made in the channel of a stream for the general welfare is referable to the police power, the propriety of its exercise must still be considered under the distinct circumstances presented. While the police power is very broad in concept, it is not without restriction in relation to the taking or damaging of property. When it passes beyond proper bounds in its invasion of property rights, it in effect comes within the purview of the law of eminent domain and its exercise requires compensation."

This Court then quoted from *Archer* v. *City of Los Angeles* (1941), 19 Cal. 2d 19, 119 P. 2d 1 as follows (p. 388):

" 'The state or its subdivisions may take or damage private property without compensation if such action is *essential* to safeguard public health, safety or morals. (Citing authorities.) *In certain circumstances, however, the taking or damaging of private property for such a purpose is not prompted by so great a necessity as to be justified without proper compensation to the owner.* * * *' "

and continued (p. 388):

> "Thus there is recognized the incontestable proposition that the exercise of the police power, though an [fol. 334] essential attribute of sovereignty for the public welfare and arbitrary in its nature, cannot extend beyond the necessities of the case and be made a cloak to destroy constitutional rights as to the inviolateness of private property." (Emphasis added.)

Justice Carter's observations in his dissent in *Archer v. City of Los Angeles*, 19 Cal. 2d 19, 29, although involving the flooding of privately owned lands by the Los Angeles Flood Control District, are just as pertinent here:

> "The true basis of liability in cases of this character is found in the constitutional provision prohibiting the taking or damaging of property for a public use without the payment of just compensation. (California Constitution, art. I, sec. 14.) The liability exists independent of negligence on the part of the public agency." (P. 35.)
>
> "Manifestly, the correct test of whether or not the police power has been properly exercised is not and never has been the degree of public necessity. To be appropriate it must be for the public health, safety, morals, or general welfare. If the degree of public necessity be the test then the constitutional guarantee of just compensation for property taken for a public use is completely and forever abrogated. If a legislative body finds that public necessity requires the taking of property for highways, for streets, for a water supply, for recreational areas, for hospitals, for schools or other public buildings, or for a myriad of other public purposes, the courts must accept such a finding as conclusive. If such a finding is all that is necessary to warrant the exercise of the police power, there will be no occasion for the state or other public agency ever paying for any private property taken or damages for a public improvement. Who may say that property for [fol. 335] schools, highways, streets, etc., is not absolutely necessary for the proper functioning of the gov-

ernment? Indeed, it is an indispensable factor in the exercise of the power of eminent domain where compensation is payable, that the public convenience and necessity demand the taking or damaging of any private property involved in the public improvement contemplated. Thus, under the theory advanced in the majority opinion, in any case that the power of eminent domain may be properly exercised, the police power could also be invoked with the result that no compensation could be recovered. Although it is difficult to charter the dividing line between the exercise of the two powers, it may be justifiably said that police power operates in the field of regulation, except possibly in some cases of public emergency such as a fire where buildings may be destroyed, rather than in the taking or damaging of property for some public improvement. A man may be prevented under the police power from so using or maintaining his property that it is detrimental to the public health, safety, morals or general welfare. Regulations may be invoked to prohibit such use and maintenance. But where neither his property nor its use or maintenance by him has any relation to the public good sought to be accomplished or evil to be remedied, other than that the public desires to use his property, he should be compensated for the taking or damaging of it if the constitutional guarantee still exists." (Pp. 54, 55.)

"I cannot refrain from adverting to the recent but growing tendency of some courts and judges toward the destruction of constitutional guarantees by the process of specious interpretation. It may be that such constitutional guarantees are obnoxious to the social or economic philosophy of the judge or judges deciding the particular cause; but I submit that it is for [fol. 336] the people and not the courts to bring about changes in our Constitution. To invoke the police power as a justification for the taking or damaging of private property for public use in violation of section 14 of article I of the Constitution of California is nothing less than amending the Constitution by judicial edict or nullification by sanction of law." (P. 59.)

The *Archer* case was followed in the holding of this Court in *Rose* v. *State of California*, 19 Cal. 2d 713, 105 P. 2d 302. There plaintiff sued to recover compensation for damages caused through loss of its means of ingress and egress by the construction of a subway or underpass in the center of the street. Defendant contended that the damage, if any, occurred as a result of the exercise of the police power and was therefore *damnum absque injuria*. In response to defendant's contention, the Court said:

> "This contention is wholly without merit as there is no basis for the application of the police power doctrine to the factual situation in this case.
>
> "Generally, it may be said that police power operates in the field of regulation, except possibly in some cases of emergency such as conflagration or flood when private property may be temporarily used or damaged or even destroyed to prevent loss of life or to protect the remaining property of an entire locality. There is obviously no element of regulation involved in the case at bar, and no suggestion of anything in the nature of an emergency. The damage to plaintiff's property here involved was the result of a public improvement constructed by the state in the exercise of its power of eminent domain.
>
> "While it is true that the seeming absolute protection against the taking or damaging of private property for public use provided for in section 14 of article [fol. 337] I of our Constitution may be qualified by the police power in the area in which such power operates, it should be obvious that the police power doctrine cannot be invoked in the taking or damaging of private property in the construction of a public improvement where no emergency exists. To hold otherwise would in effect destroy the protection guaranteed by our Constitution against the taking or damaging of private property for a public use without compensation. (*Gray* v. *Reclamation Dist. No. 1500*, 174 Cal. 622 (163 Pac. 1024); *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 260 U. S. 393 (43 S.Ct. 158, 67 L. Ed. 322).)"

7. No exercise of the police power is constitutional unless it meets the test of *reasonableness*.

> "The power to regulate the use of property or the conduct of a business is, of course, not arbitrary. The restriction must bear a reasonable relation to some legitimate purpose within the purview of the police power."
>
> *Ex parte Hadacheck* (1913), 165 Cal. 416, 421, 132 Pac. 584; affirmed (1915) 239 U. S. 394, and cited with approval in the *Walters case* (294 U. S., at p. 429).

On reasonableness as a test, the text writers all agree, e.g., 16 C.J.S., pp. 562-563:

> "The police power is subject to the limitation that its exercise must be reasonable and for the public good, * * * the test of the validity of an exercise of the police power is whether it is reasonable."

At 16 C.J.S. 1159 there is stated generally as a section heading:

> "The guarantee of due process does not prevent the exercise of the police power, provided such exercise is [fol. 338] reasonable and the means selected have a real substantial relation to the object sought to be attained."

Under this heading, just quoted, the text at 16 C.J.S. 1160-1163 states:

> "Hence, while the guaranty does not interfere with the proper exercise of the police power, and does not prohibit governmental regulation for the public welfare, it of necessity giving way to reasonable police regulations protecting life and property, the due process clause does condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process, which demands that it be for a public purpose, that it be not unreasonable, arbitrary, or capricious, which demands only that the law shall not be unreasonable, arbitrary, or capri-

cious, or that the law shall not be unduly oppressive, and that the means selected shall have a real substantial relation to the object sought to be attained."

8. Most important of all, the reasonableness of any application of the police power is to be tested in the light of contemporaneous conditions. In *Wholesale Tobacco Dealers Bu*, v. *National Candy & T. Co.* (1938), 11 Cal. 2d 634, 644, 82 P. 2d 3, the Court says:

> "The police power has not expanded. Its proper exercise has always been and still is confined to regulation in the public welfare and has always been and still is subject to the standard of reasonableness in its relation to that interest. However, changed social, political and economic conditions have enlarged the field of conduct which may properly be subjected to regulation in order that the general welfare may be adequately protected. *The proper application of the power cannot be measured by past precedents—the test* [fol. 339] *is, of course, present day conditions.* These principles have frequently been enunciated by this court and by the Supreme Court of the United States." (Emphasis supplied)

The bases for petitioner's charge that the Commission's order is unconstitutional are restated for clarification. Petitioner's property is summarily taken without compensation in the form of benefits received by the proposed construction. Additionally, a substantial financial burden is imposed upon petitioner as an essential instrumentality of interstate commerce, which burden is wholly disproportionate to the slight and dubious safety advantages (if any) resulting therefrom. The substantial subject matter within the province of the police power—public health, morals, safety and welfare—has no substantial relation to the "object sought to be attained" which in this proceeding is primarily, indeed almost entirely, the expediting of vehicular traffic. The challenged imposition does not bear a reasonable relation to "the evils to be eradicated or the advantages to be secured." The correct test of whether or not the police power has been properly exercised is not and

never has been the degree of public necessity, much less mere convenience. No emergency exists to justify the taking of property without compensation or in lieu thereof benefits that accrue to petitioner. Finally, the Commission's purported exercise of the police power is in fact a reversion and retrogression to conditions existing long ago, is based upon outmoded precedents, ignores present day conditions, and is therefore unreasonable.

[fol. 340]

III

Petitioner Is Entitled to Have This Court Exercise Its Independent Judgment Upon the Law and Facts in This Case.

In this proceeding petitioner, from the outset, has maintained and continues to maintain, as the principal basis for its challenge of the order here under attack, that said order violates rights guaranteed to petitioner under the Constitution of the United States: specifically, the Commerce Clause (Article I, Sec. 8, Par. 3), and the due-process clause of the Fourteenth Amendment. (See pp. 6 and 7, of the petition and pp. 86-88, and 94, of the supporting memorandum of points and authorities.) In view of the constitutional issues thus presented, petitioner has therefore asserted that in determining the merits of this case this Court may and should exercise its independent judgment upon the law and the facts (petition, pp. 6, 7); and has relied upon Section 1760 of the Public Utilities Code and, among others, the following decisions: *Bluefield Water Works Co.* v. *Public Service Commission* (1922), 262 U. S. 679; *Ohio Valley Water Co.* v. *Ben Avon Borough* (1920), 253 U. S. 287; *Nashville, C. & St. L. R. Co.* v. *Walters, supra*; and *Southern California Edison Co.* v. *Railroad Commission* (1936), 6 Cal. 2d 737, 59 Pac. (2) 808.

Notwithstanding the apparently clear statement and exposition of petitioner's position, the Commission, in its answer (at p. 57) advances the following argument:

> "Surely no public utility has a right to relitigate in the courts, on the grounds that constitutional rights are involved, factual questions such as herein determined by the Public Utilities Commission";

[fol. 341] and again (at p. 28) directs its argument to petitioner's asserted contention for a "trial *de novo*."

It is almost superfluous to say that petitioner has not contended, and does not contend, that this case should be "relitigated," i.e., retried anew in this Court. It would seem that a mere casual reading of the petition and supporting brief would have disclosed sufficiently that petitioner was seeking nothing more than an independent determination by this Court *upon the record made before the Commission*, as contemplated by the express language of Section 1760 (when read in connection with Section 1757 of the Public Utilities Code), and the decisions of this Court applying those statutory provisions. Compare the prayer of the petition (p. 9), in which petitioner asks (1) that this Court require *the Commission to certify* to the Court *its complete record* in the proceedings before it, and (2) that the Court then review *the record* of *said* proceedings, and *thereupon* render its decision; and see also the citation (p. 56 of the petition) of Section 1760, and the controlling decision of this Court in the *Edison Case, supra* (6 Cal. 2d, 737). If further clarification of petitioner's position be needed, we need only add that we rely upon the principles stated in the following quotation from California Jurisprudence (2 Cal. Jur. 2d 373):

> "With respect to constitutional facts, for instance, the courts may consider the evidence presented in a proceeding in order to determine whether an administrative decision or order violates any right of a party under the state or federal constitution, even where the proceedings are before an agency enjoying special constitutional status whose determinations are otherwise subject only to a limited review. The rule that the ad- [fol. 342] ministrative determination of facts bearing on constitutional rights of a litigant, even though supported by evidence, is not conclusive on the court, and that the court will exercise its own independent judgment on the evidence, is typically applied where rates found by an administrative authority to be reasonable are attacked as confiscatory and the court makes its own determination as to the value of the property involved."

Considered by itself, the Commission's apparent failure to read and understand petitioner's position with respect to the scope of this Court's review would be of little consequence. However, this initial misconception has been employed by the Commission as the starting point for a series of arguments which, when taken together, amount to a broad contention that in this case (or presumably any other of like character) this Court has no power or duty to inquire into the facts, other than as found by the Commission, or to review the underlying evidence, or otherwise to take any steps whatever in order to determine whether the Commission has correctly found the facts, or has, on the other hand, sought to support erroneous conclusions through the medium of "insubstantial findings of fact screening reality" (*Milkwagon Drivers' Union* v. *Meadowmoor Dairies*, 312 U. S. 287, 293).

Thus, as already noted, the Commission argues (Answer, p. 41) that its "decision carries a strong presumption of validity," and "has the same force and effect as a statute enacted by the legislature"; (p. 43) that "this Court may not substitute its judgment for that of the" Commission; (p. 45) that the Commission's "authority over Public Utilities" is "plenary and exclusive," and that the Legislature [fol. 343] "may confer upon the Commission powers that the Legislature itself could not exercise"; (p. 47) that "the constitutionality of a statute" (and hence presumably of this order) "will only be passed upon where absolutely necessary"; and (pp. 28-30), that since the United States Supreme Court has (assertedly) repudiated the rule of independent court review in Commission proceedings where constitutional issues are raised, this Court should no longer observe or be guided by Section 1760 of the Public Utilities Code.

The simple and conclusive answer to the Commission's entire argument is that Section 1760 is still the law of this state; and in this respect the statute law has not been changed since the predecessor statute was enacted in 1933. Moreover, and notwithstanding the decision of the United States Supreme Court rendered May 21, 1951, in *Alabama Public Service Commission* v. *Southern R. R. Co.*, 341 U. S. 341 (upon which the Commission principally relies, pp.

27-28, to support its argument), the legislature of this state re-enacted this particular provision of former Section 67 of the Public Utilities Act as present Section 1760 of the Public Utilities Code, by statute approved May 31, 1951, effective September 22, 1951.

The history of the original enactment of the amendment of Section 67 of the Public Utilities Act, now Section 1760, is set forth in some detail in this Court's opinion in the *Edison Case, supra* (6 Cal. 2d, at pp. 744-746). This Court remarked, in the course of that discussion, that the amendment of Section 67 had not accomplished any actual change in the prevailing rule in this state, in respect to the power of this Court to review quasi-legislative orders of the Commission. The Court said that even prior to the amendment [fol. 344] it was the Court's function to dispose of cases coming before it from the Commission for review, in which federal constitutional questions were appropriately raised; that in disposing of them the Court acted judicially, and its determination was "on the merits"; and that even though Section 67 had previously assumed to make final the Commission's findings and conclusions on questions of fact, the Court had excluded the apparent finality of that provision from operation, when federal constitutional objections were available to the complaining party (6 Cal. 2nd, at p. 647).

Nevertheless, and regardless of the fact that Section 1760 has been so recently re-enacted, the Commission's position appears to be that the *Alabama decision* has effectively overruled and (to use the Commission's own terminology) "repudiated" the principle set forth in that section (Answer, p. 28). Analysis of the decision and consideration of its results will demonstrate that in fact nothing of the sort took place; in this respect, as in other passages in its reply, the Commission has apparently failed to understand the true import of the decision. Far from overruling or even departing from the principle of the *Ben Avon* decision, the Court in the *Alabama case* pointed out, in some detail, that the State of Alabama had provided for a full and independent review of orders of its Public Service Commission, by establishing a right of appeal to a court of first instance (the circuit court of a county), with an additional right of appeal from that court to the State Supreme Court. In both

courts, the consideration provided for was upon the record certified by the Commission, without the taking of additional evidence. The Court further noted that the highest court of the state had also held that when a denial of due [fol. 345] process was claimed to be the effect of the challenged order of the state commission, the judicial review in the state courts contemplated the exercise by the court of independent judgment as to both law and facts (see 341 U.S., at p. 349). In this situation, the United States Supreme Court concluded that there was available, to the complaining party, an adequate state-court procedure for review of commission orders, sufficient to preserve federal questions arising out of such orders for ultimate review in the Supreme Court; so that resort to the United States District Court in a separate proceeding for injunctive relief was not necessary. The latter, and no more, was the question actually presented and decided.

The *Alabama decision* is pertinent here as approving in principle (and in no sense "repudiating") the scope of the review provided for in Section 1760; for in Alabama, as in this state, the review is on the record made before the Commission; the principal difference between the Alabama and the California procedures being that in Alabama there are appeals as of right, first to the Circuit Court and thence to the State Supreme Court, whereas in this state the only "appeal" is by petition for review to this Court.

Other recent decisions of the United States Supreme Court also clearly indicate that the rule of the *Ben Avon case*, and thus of Section 1760, is well recognized. *Oyama* v. *California* (1948, 332 U. S. 633 (636); *Niemotko* v. *Maryland* (1951), 340 U. S. 268 (271); compare also this Court's recent decision in *Laisne* v. *State Board* (1942), 19 C. 2d 831, (845), 123 P. 2d 457.

The Commission's clear failure to analyze correctly the nature and result of the *Alabama decision* leaves its argu [fol. 346] ment on the points here discussed without any substantial authoritative support. The correct conclusion, based upon the statute and the controlling decisions, is that this Court not only may but must exercise its independent judgment on the law and the facts, and that such review is not foreclosed by any presumptions of validity or correct-

ness. The order here challenged being, as the Commission repeatedly asserts (answer, pp. 41-42, 47), "statutory" (i.e., legislative) in nature, this Court must necessarily pass *upon the merits* of the questions presented (*Edison Case, supra*, 6 C. 2d at p. 747).

The fact is that, in cases where constitutional issues have been presented, this Court, irrespective of asserted presumptions or other language relative to the weight to be given to determinations made by the Commission, has regularly and uniformly undertaken its own independent review of the record, and has never considered that the Commission's conclusions were controlling, or binding, or even presumptively correct, unless duly supported by adequate, competent, credible evidence; because obviously to have done so would have been to deprive the moving party of its right to an *independent judicial* determination. Compare, among other recent cases: *Southern Pacific* v. *Railroad Commission*, 13 C. 2d 125 (130), 87 Pac. (2) 1052; *Pacific T. & T. Co.* v. *Public Utilities Commission*, 34 C. 2d 822, 215 Pac. (2) 441; *Southern California Freight Lines* v. *Public Utilities Commission*, 35 C. 2d 586, 220 Pac. (2) 393; and *Souza* v. *Public Utilities Commission*, 37 C. 2d 539, 233 Pac. (2) 537. The governing principle is clearly indicated by the decision of the United States Supreme Court in *N. C. & St. L. R. Co.* v. *Walters, supra* (294 U. S. 405, pp. 415-416):

> [fol. 347] "Unless the evidence and the special facts relied upon were of such a nature that they could not conceivably establish that the action of the state in imposing upon the Railway one-half of the cost of the underpass was arbitrary and unreasonable, the Supreme Court of Tennesse obviously erred in refusing to consider them."

and (p. 428):

> "The Supreme Court of Tennessee erred in refusing to consider whether the facts relied upon by the Railway establish as arbitrary and unreasonable the imposition upon it of one-half the cost of the underpass."

The Commission also cites (ans., p. 46) *Pacific T. & T. Co.* v. *Eshleman* (1913), 166 Cal. 640, 655-6, 658-9, 689, 137 Pac.

1119, to support the contention that the Legislature *may* confer on the Commission any and all authority it possesses. The cited pages of the *Eshleman case* indicate that the Court was there referring to "the authority of the Legislature to confer" powers upon the Commission, as provided in Article XII, Section 22, of the California Constitution. Nothing in this case is authority that the Legislature conferred *all* of its powers on the Commission.

Another case cited by the Commission (ans., p. 46) is *Clemmons* v. *Railroad Commission* (1916), 173 Cal. 254 (258), 159 Pac. 713, where this Court had before it the specific question as to when the Commission's orders take effect. The Court said:

> "The power of review which is given must be exercised within the limits and upon the conditions which the legislature has seen fit to fix."

[fol. 348] This language may be compared with Section 1760, and this Court's expressions in *Southern California Edison Co.* v. *Railroad Commission, supra* (6 C.(2d), at pp. 744-746), where, as previously shown, the powers of this Court in review proceedings are discussed at length.

The decision in *City of San Jose* v. *Railroad Commission* (1917), 175 Cal. 284, 289, 290, 165 Pac. 967, appears to have been cited by the Commission (ans. p. 46) through error or misunderstanding. The decision has no application whatever to the question of the review in this Court. However, we welcome the Commission's reference to this case, for as we show in Point I of the Petition (pp. 18-19), it is squarely in point to support our reliance upon the "benefit" principle in grade-separation matters.

The decision in *Miller* v. *Railroad Commission* (1937), 9 Cal.2d 190, 195, 198, 70 Pac.(2) 164, also appears not to have been fully understood by the Commission (ans. p. 46). The opinion therein declares (at p. 195):

> "This decision of the Railroad Commission in matters affecting public utilities is final and conclusive *except as the same is restricted by section 67 of the Public Utilities Act*, which provides for a writ of review to this court in certain matters." (Sec. 67 of the Public

Utilities Act is now Sections 1756-1760, inc., of the Public Utilities Code.)

The other case cited by the Commission at page 46 of its answer is *Sale* v. *Railroad Commission*, 15 Cal.2d 612, 617, 104 P.2d 38. The language quoted by the Commission from the opinion affords no support to the Commission's contention respecting the effect of its decisions. In fact, the case involved a decision of the Commission from which no [fol. 349] appeal had been taken within the time provided in Section 67 of the Public Utilities Act; and the question discussed by the Court was as to the power *of the Commission* to *reopen* a matter, after its decision therein had been final *for a year*. The power of this Court on review was not even discussed.

At the risk of repetition, but as a conclusive answer to the Commission's attempt to picture this case as "relitigation" or "retrial" of factual questions, we emphasize again that petitioner is seeking a *judicial review* of a decision as to which it asserts that federal (and state) constitutional rights have been denied. Petitioner does not ask to bring in new evidence, but does ask that the Court examine the evidence (Pet., p. 6), and exercise its *independent judgment* as to both the law and the facts, as provided by Section 1757 and 1760 of the Public Utilities Code.

Conclusion

As indicated repeatedly in the proceedings before the Commission, in the original petition to this Court, and in the text of this reply, this petitioner does not oppose and has never opposed the construction of the Los Felis grade separation. On the contrary, petitioner agrees with the other parties in interest, and with the Commission's indicated present position, that while no question of actual measurable hazard at the crossing is involved, nevertheless, the separation is desirable—even essential—for the rapid and uninterrupted movement of motor vehicles upon and along this major artery, and upon the nearby state highway (San Fernando Road) which parallels petitioner's own lines.

[fol. 350] But petitioner is now confronted with a decision

and order of the Commission which not only authorizes the construction, but also by separate conclusion undertakes to impose upon petitioner half of the overall cost thereof. The amount thus involved far exceeds the value of any possible or even arguable benefits that petitioner might receive, even if the contentions of the Commission (its answer, pp. 48-49) as to the sum total of these benefits were all accepted as correct.

In making this allocation the Commission (correctly) states that it has rejected the "benefit principle." It also (erroneously) states that in so doing it is supported by certain decisions of the United States Supreme Court, assertedly approving the allocation of costs of separations to the railroads involved without regard to benefit. As if to buttress its rejection of the benefit principle and its claimed reliance upon these cases, the Commission has indulged in a purely formal finding that public "safety" (as distinct from "convenience" or "necessity") justifies the separation: this although its own evidence, which it now accepts without question, shows that the actual hazard at the present grade crossing is negligible.

With equal disregard of the evidence, the Commission has also found that the proposed separation "does not concern" the nearby (federally-aided) state highway and that the State Department of Public Works is not directly involved: this although the uncontradicted evidence establishes, and the Commission admits (Ans. p. 5), that relief of congestion on the state highway is one of the principal purposes and expected benefits of the separation. The apparent intent and obvious purpose of this erroneous finding are to [fol. 351] avoid any possibility of the application here of the "benefit principle" adopted by Congress for separations involving highways built in whole or in part with federal funds; for except for that consideration, the finding would be unnecessary and immaterial.

The Commission has, moreover, committed a fundamental error of law, in that it has expressly rejected the controlling principles laid down in the *Nashville case* (*Nashville, C. and St. L. R. Co.* v. *Walters*, 294 U.S. 405) and there applied to reverse an attempted unconstitutional imposition of grade-separation costs of the same character as in the case at bar.

The Commission itself comments (its answer, p. 50) that the essential issue here is very simple. Conversely stated, the issue is whether the Commission, as a state agency exercising the delegated police power, may, on the one hand impose an allocation of the costs of a grade separation upon the several parties in interest determined by the more arbitrary use of its own discretion, and without reference to or observance of any stated or discoverable standard; or must, on the other hand, allocate such costs, so far as possible, in fair proportion to the actual benefits which the parties will receive. In the case at bar the Commission has adopted the first alternative, and now insists that its discretion is supreme, immune to challange or correction, and beyond the reach of this or any other Court. Petitioner believes that even the Commission must observe fundamental constitutional principles, and that those principles require the observance of the "benefit principle," expressed in the second alternative.

This case is of outstanding importance, from the standpoint of both the principles involved, and the very sub-
[fol. 352] stantial interests at stake. We earnestly urge that the Court's writ should issue, so that this Court may by its own mature and considered judgment settle for this state this very important question.

Respectfully submitted, E. J. Foulds, Burton Mason, Randolph Karr, Attorneys for Petitioner.

January 22, 1953, San Francisco, Calif.

(Supplemental Appendix follows.)

[fol. 353] SUPPLEMENTAL APPENDIX

Decision No. 47819

Before the Public Utilities Commission of the State of California

Application No. 32385

In the Matter of the Application of the CITY OF GLENDALE, a municipal corporation, for an order or orders authorizing and requiring the construction of a grade separation of the crossing of Los Feliz Road and the railroad of the SOUTHERN PACIFIC COMPANY, designating the portions of the work to be done respectively by said City, THE CITY OF LOS ANGELES and said railroad corporation, and allocating the cost thereof among said Cities and said railroad corporation.

Case No. 5327

In the Matter of the Investigation on the Commission's own motion as to the necessity of effecting a grade separation between the tracks of the Southern Pacific Company and Los Feliz Boulevard in the Cities of Los Angeles and Glendale, County of Los Angeles, State of California and the division among the affected parties of the cost incident to such separation.

Opinion

Pursuant to an application filed by the City of Glendale on May 7, 1951, and an Order of Investigation issued by this Commission on September 25, 1951, and, after public hear-[fol. 354] ings were held thereon, this Commission by Decision No. 47420, dated June 30, 1952, in Application No. 32385 and Case No. 5327, issued an order authorizing and directing the separation of grades of Los Feliz Road and the tracks of the Southern Pacific Company, subject to certain specified conditions. The conditions allocated the costs of the proposed structure among the various parties concerned and designated the responsibility for maintenance of the structure when completed. Likewise, the conditions

directed the applicant city to prepare plans and specifications and submit them to this Commission and to the other interested parties within 120 days from the date of the order. Further, the construction authorized was ordered to be commenced within one year and completed within two years from the date of the order.

The City of Glendale now has petitioned for an extension of time in connection with Decision No. 47420, alleging that additional time is necessary in order to satisfactorily prepare plans and specifications, and, further, that the decision will in all probability be reviewed by the California Supreme Court. In view of these circumstances it is requested that the time be extended to permit the filing of plans and specifications within 240 days of the effective date of the order, and that, in the event a review is sought in the Supreme Court of California or in the Supreme Court of the United States, or both, the calculation of time shall commence at the date the decision becomes finally affirmed or the date a hearing is finally denied, rather than the effective date.

[fol. 355]

Order

Petition as above entitled having been filed, the Commission being fully advised in the premises, and good cause appearing,

IT IS ORDERED that Conditions 3 and 7 of Decision No. 47420, dated June 30, 1952, on Application No. 32385 and Case No. 5327, be and they hereby are cancelled, and in lieu thereof the following conditions are substituted:

3. The City of Glendale shall prepare detail plans and specifications for the construction of the grade separation, as referred to above, to carry Los Feliz Road under the tracks of Southern Pacific Company in the City of Glendale, the City of Glendale to submit said plans and specifications to the other interested parties and to the Commission for its approval within two hundred and forty (240) days from the effective date hereof. Should they fail to agree on the plans, such disagreement shall be reported to the Commission, whereupon an appropriate order will be entered.

7. The construction herein ordered shall be com-

menced within one year and completed within two years after the effective date hereof, unless further time is granted by subsequent order.

It Is Further Ordered that an additional condition be added to Decision No. 47420, supra, as follows:

9. In the event review is sought of this decision in either the Supreme Court of California or the Supreme Court of the United States or both, the calculation of time for compliance with the provisions of this [fol. 356] order shall commence from the date the decision becomes finally affirmed or the date a hearing is finally denied rather than the effective date hereof.

The effective date of this order shall be the date hereof.

Dated at San Francisco, California, this 14th day of October, 1952.

R. E. Mittelstaedt, President, Justus F. Craemer, Harold P. Huls, Kenneth Potter, Peter E. Mitchell, Commissioners.

[fol. 357] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

SOUTHERN PACIFIC COMPANY

vs.

PUBLIC UTILITIES COMMISSION

S.F. No. 18704

ORDER DENYING WRIT OF REVIEW—filed March 9, 1953

Petition for writ of review denied.

Edmonds, J. and Schauer, J. are of the opinion that the petition should be granted.

Gibson, Chief Justice.

[fol. 358] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

[Title omitted]

PETITION FOR APPEAL—filed March 26, 1953

To the Honorable, the Chief Justice of the Supreme Court of the State of California:

Southern Pacific Company, a corporation, the above-named petitioner, respectfully shows:

Petitioner duly filed with the Supreme Court of California its petition for a writ of review, praying said Court to issue its said writ for the purpose of determining the lawfulness of Decisions Nos. 47420 and 47597 of the Public Utilities Commission of the State of California, dated respectively July 9, 1952, and August 19, 1952, and by its said petition duly presented the federal questions with which this petition for appeal is essentially concerned.

On March 9, 1953, said Supreme Court of California rendered and entered its order, denying said petition for writ of review, and thereby adjudged and decided that said de-
[fol. 359] cisions of the Public Utilities Commission of the State of California are valid and lawful. The Supreme Court of California is the highest court of the State of California, and the highest court, and the only court, of said state in which a judgment in this cause could be had.

Wherefore, petitioner, considering itself aggrieved by the aforesaid final decree and judgment of the Supreme Court of California, does hereby pray that an appeal be allowed to the Supreme Court of the United States from said decree and judgment, for the correction of the errors set forth in the assignment of errors filed herewith, and hereby refers to the statement as to jurisdiction, also filed herewith, for a more complete statement of the reasons supporting the allowance of this appeal;

And petitioner further prays: that citation be issued in accordance with law; that an order be made respecting the appeal bond to be given by petitioner; that the amount of security be fixed by the order allowing the appeal; and

that the material parts of the record, proceedings and papers upon which said final judgment and decree was based, duly authenticated, be sent to the Supreme Court of the United States in accordance with the rules in such case made and provided.

Respectfully submitted, George L. Buland, E. J. Foulds, Burton Mason, Randolph Karr, Counsel for Petitioner.

Dated: March 20, 1953.

[fol. 360] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

[Title omitted]

ORDER ALLOWING APPEAL TO THE SUPREME COURT OF THE UNITED STATES—filed March 26, 1953

Southern Pacific Company, a corporation, the above-named petitioner, having presented and filed its petition praying for an appeal to the Supreme Court of the United States from the final judgment and decree of this Court in this cause entered on March 9, 1953, and having presented its assignment of errors and prayer for reversal and its statement as to the jurisdiction of the Supreme Court of the United States on appeal pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided, and it appearing that there was drawn in question in this cause the validity of an order of the Public Utilities Commission of the State of California on the ground of its repugnance to the Constitution and laws of the United States and that the decision of this Court was in favor of its validity,

[fol. 361] Now, therefore, it is hereby ordered, that said appeal be and the same is hereby allowed as prayed for.

It is further ordered that the amount of the appeal bond be and the same is hereby fixed in the sum of Five Hundred Dollars ($500.00) with good and sufficient surety, and shall be conditioned as required by law.

It is further ordered that citation shall issue in accordance with law.

It is further ordered that the Clerk of this Court shall make and transmit to the Supreme Court of the United States under his hand and seal a true copy of the material parts of the record in this cause, in accordance with the rules of the said Court in such cases made and provided.

Gibson, Chief Justice.

Dated: March 26, 1953.

[fol. 362] Citation in usual form on Hal F. Wiggins omitted in printing.

[fol. 363] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

[Title omitted]

ASSIGNMENT OF ERRORS—filed March 26, 1953

Southern Pacific Company, a corporation, the above named petitioner-appellant, in connection with its petition for the allowance of an appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of California in this cause, entered on March 9, 1953, assigns the following errors which it avers occurred, and upon which it will rely in prosecution of its said appeal.

The Supreme Court of the State of California erred, in and by its said judgment herein:

1. In failing to hold and conclude that those certain opinions and orders of the Public Utilities Commission of the State of California, identified respectively as said Commission's Decision No. 47420, dated June 30, 1952, and Decision No. 47597, dated August 19, 1952, insofar as said Commission has thereby undertaken to order petitioner to pay one-half of the allocable cost of the construction of the contemplated grade separation at the point where petitioner's main line of railroad crosses Los

[fol. 364] Feliz Road (Boulevard), in the City of Glendale, California, are in that respect void, invalid, and unconstitutional, in violation of the Due-Process Clause of the Fourteenth Amendment to the Constitution of the United States: because said decisions would require petitioner to contribute an amount and proportion of said cost wholly unrelated to, and greatly exceeding, the value of the benefits, or any benefits, which said petitioner will or might derive therefrom, and said decisions, if enforced, will therefore operate to deprive petitioner of its property without due process of law, and to take its said property for public use without just compensation.

2. In failing to hold and conclude that said orders, to the extent that petitioner is, or may be, compelled thereby to pay an amount and proportion of the cost of the construction of said Los Feliz grade separation, wholly unrelated to, and greatly exceeding, the value of any benefits which said petitioner may receive therefrom, will if enforced impose direct, substantial, and unreasonable financial burdens upon the interstate commerce carried on by petitioner, and impair the use and usefulness of the facilities employed by petitioner in the transportation of such commerce, in violation of the Commerce Clause (Article I, Section 8, Paragraph 3) of the Constitution of the United States, and the National Transportation Policy enacted by Congress (54 Stat. 899).

3. In failing to hold and conclude that said orders of said Commission, to the extent that they purport to require of petitioner the payment of 50 percent of the allocable cost of the construction of said Los Feliz grade separation, are not founded upon or responsive to any evidence material to the question of the apportionment of said cost, but instead bear no relation to, and are in conflict with, the unchallenged evidence, and the only evidence material to said question, of-
[fol. 365] fered before or heard by said Commission in the proceedings in which its said orders were rendered; and that said orders are therefore arbitrary, in violation of the procedural standards guaranteed and required by law, and if enforced will result in depriving petitioner of its property without due process of law, in violation of the aforesaid Due-Process Clause.

4. In failing to hold and conclude that said Decision No. 47420, in that said Commission has undertaken therein to find and conclude that said proposed construction is or would be required or justified in the interest of public safety, is not founded upon or responsive to, but instead is directly in conflict with, the uncontradicted evidence, and is therefore and in said respect unreasonable and arbitrary, in contravention of the procedural standards aforesaid, and in violation of petitioner's rights guaranteed by the aforesaid Due-Process Clause.

5. In failing to hold and decide that said decisions, in that said Commission has therein found that said proposed construction does not concern a state highway, and has failed to find and conclude that said construction is and will be justified and required, if at all, essentially and primarily for the purpose of furthering the rapid and uninterrupted movement of motor-vehicle traffic upon certain major through highways, are not responsive to, but are directly in conflict with the material and uncontradicted evidence; and that said decisions are in said respects therefore arbitrary and unreasonable, in contravention of the procedural standards aforesaid, and in violation of petitioner's rights guaranteed by said Due-Process Clause.

For which errors, the above-named petitioner prays that the said judgment of the Supreme Court of the State of California, dated March 9, 1953, and said Decisions Nos. 47420 and 47597 of the Public Utilities Commission of the State of California hereinbefore referred to, be held and declared to be void, invalid, and [fol. 366] unenforceable, and therefore reversed and set aside.

Dated: March 20, 1953.

George L. Buland, E. J. Foulds, Burton Mason, Randolph Karr, Counsel for Petitioner.

[fols. 367-368] Statement Required by Paragraph 2, Rule 12, of the Rules of the Supreme Court

(Omitted in printing)

[fols. 369-370] PROOF OF SERVICE

(Omitted in printing)

[fols. 371-372] AFFIDAVIT OF SERVICE BY MAIL

(Omitted in printing)

[fols. 373-374] PRAECIPE

(Omitted in printing)

[fols. 375-376] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 377] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1952

No. 739

SOUTHERN PACIFIC COMPANY, a corporation, Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and R. E. MITTELSTAEDT, JUSTUS F. CRAEMER, HAROLD P. HULS, KENNETH POTTER and PETER E. MITCHELL, as members of and constituting said Commission, Appellees.

APPELLANT'S STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—filed April 29, 1953.

A. Appellant adopts for its Statement of Points upon which it intends to rely in its appeal to this Court the points contained in its Assignment of Errors heretofore filed.

B. Appellant designates the entire record, as filed [fol. 378] in the above entitled case, for printing by the Clerk of this Court.

Dated: April 27, 1953.

Southern Pacific Company, Appellant, By: George L. Buland, E. J. Foulds, Burton Mason, 65 Market Street, San Francisco 5, California, Randolph Karr, 670 Pacific Electric Bldg., Los Angeles, California, Attorneys for Appellant.

[fols. 379-381] AFFIDAVIT OF SERVICE BY MAIL

(Omitted in printing)

[fols. 382-383] [File endorsement omitted]

[fol. 384] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 739

ORDER POSTPONING JURISDICTION—May 18, 1953.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court is postponed to the hearing of the case on the merits. The case is transferred to the summary docket and assigned for argument immediately following No. 667, A. T. & S. F. Ry. Co. vs. Public Utilities Commission of California et al.

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STATUTES AND OTHER AUTHORITIES CITED

Annual Report of the Interstate Commerce Commission:
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 667

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNA AND CITY OF LOS ANGELES

APPEAL FROM THE SUPREME COURT OF CALIFORNIA

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, appellant [1] submits herewith its statement particularly disclosing the basis upon which this Court has jurisdiction on appeal to review the judgment of the Supreme Court of California entered in this cause.

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[1] Appellant will sometimes hereafter be referred to as the Santa Fe, the Public Utilities Commission of California as the Commission, and the City of Los Angeles as the City.

Opinions Below

The Supreme Court of California wrote no opinion. The original opinion and order of the Public Utilities Commission of California in this cause are reported at 49 Cal. P. U. C. 147 and a copy is attached hereto as Appendix A. The opinion and order of the Public Utilities Commission on rehearing are reported at 51 Cal. P. U. C. 771 and a copy is attached hereto as Appendix B.

Jurisdiction

The judgment of the Supreme Court of California in this cause was entered on December 11, 1952. A petition for appeal was presented to the Chief Justice of said Court on March 6, 1953. The jurisdiction of the Supreme Court to review this decision by appeal is conferred by Title 28, United States Code, Section 1257(2).

The state action of which review is sought in this Court is an order of the Public Utilities Commission of California authorizing the City of Los Angeles to widen and increase the height of certain highway underpasses over which appellant's tracks are laid and directing appellant to pay 50% of the costs of the new construction. This Court has held that: "Such an order, being legislative in nature and made by an instrumentality of the State, is a state law within the meaning of the Constitution of the United States and the laws of Congress regulating our jurisdiction." *Lake Erie & W. R. R. Co.* v. *Public Utilities Commission*, 249 U. S. 422, 424 (1919); *Live Oak Water Users' Association* v. *Railroad Commission of California*, 269 U. S. 354, 356 (1926); *Hamilton* v. *Regents*, 293 U. S. 245, 258 (1934).

Manner in Which the Federal Questions Were Raised

In its Petition for Writ of Review in the Supreme Court of California, the highest court of the state and the only

state court having jurisdiction to review orders of the Commission, appellant contended specifically and in detail that the Commission's order violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Commerce Clause of the Constitution of the United States.[2] The federal constitutional principles which must be observed in the allocation of costs in grade-separation cases had been presented to the Public Utilities Commission, as stated in its opinions, and were also raised in appellant's petition for further rehearing before the Commission.

The Supreme Court of California denied appellant's Petition for Writ of Review without opinion, two judges dissenting. Its order constituted a judgment on the merits upholding the Commission's order against a claim of invalidity based upon the federal Constitution. *Napa Valley Electric Company* v. *Railroad Commission of California*, 251 U. S. 366, 372-3 (1920).

Statute Involved

The statute involved, as that term has been defined by this Court, is the Order on Rehearing of the Public Utilities Commission of California entered in this cause on June 24, 1952 and identified as Decision No. 47344 (Appendix B, *infra*).

Statement

Appellant, the Atchison, Topeka and Santa Fe Railway Company is a common carrier by railroad, operating trains in interstate commerce in the western half of the United States. For many years the Santa Fe and its predecessors have maintained railroad lines into the City of Los Angeles, California over private rights of way acquired for that pur-

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[2] Appellant's contention that the Commission's order is invalid as in conflict with the provisions of the federal Constitution was set out in detail in Part V of its Petition for Writ of Review, pp. 4-10.

pose. Two sets of tracks now cross a street known as Washington Boulevard on two railroad bridges constructed in 1914. Costs of construction of the viaducts, each of which provided street openings 20 feet wide, were borne equally by the City and the Santa Fe. In 1926 the business of the railroad required the laying of an additional track, and the Santa Fe, at its own expense, made the necessary changes in the super-structure over the street.

In 1931 the City constructed a bridge across the Los Angeles River just east of the underpasses and opened Washington Boulevard as an arterial highway extending east from the Pacific Ocean to points several miles beyond the eastern limits of Los Angeles. An immediate increase in the volume of vehicular traffic resulted in an application by the City for authority to enlarge the underpasses and an order by the Commission in 1932 authorizing the construction of two 56-foot structures to replace the existing 20-foot underpasses, 75% of the cost to be borne by the City and 25% by the Santa Fe. This order was never acted on by the City.

By 1948 the volume of traffic on Washington Boulevard had increased tremendously. The street had now been connected up with important cross-country highways then existing or in the process of construction. It had also been widened to 60 feet throughout most of its length and had become one of the City's principal arteries of truck and commercial traffic; in fact, one-fourth of the vehicles now using the streets are trucks. The center of gravity for truck traffic in the entire City of Los Angeles had shifted to a point on this highway less than a mile west of the underpasses. In short, the striking changes in the volume and character of highway vehicles in this area since 1914 are such that it has become necessary to expedite the flow of that traffic by the construction of six lane underpasses, al-

though the present viaducts are still perfectly adapted to carrying the railroad tracks, which have remained unchanged since 1926.

Accordingly, in 1948 the City applied to the Commission for authority to construct the two new underpasses here involved, each 90 feet wide and providing 15 feet vertical clearance. After receiving evidence and considering briefs, the Commission authorized the construction applied for, finding that "the widening of the underpass is now necessitated by the increase in vehicular and pedestrian traffic." By its order the Commission directed that the City should bear all expenses involved in the building of the new roadway and underpasses, with the exception of the sum of $95,160, which was allocated to the Santa Fe (Appendix A, *infra*).

Both the City and the Santa Fe filed petitions for rehearing of the Commission's order allocating costs of construction, which were granted, and a further hearing was held. Again there was no dispute about the fact that, as the Commission had previously found, the new construction was necessitated wholly "by the increase in vehicular and pedestrian traffic." The Santa Fe therefore reiterated its contention that, under principles recognized by the Commission itself for many years and enunciated by this Court in a very similar case, "so-called assessments for public improvements laid upon particular property owners are ordinarily constitutional only if based on benefits received by them."[3]

The Commission rejected this contention (Appendix B, *infra*). It ruled that the allocation of the costs of constructing rail-highway grade separations is an exercise of the state's police power and need not, therefore, have any relation to the benefits which the railroad will receive from

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[3] *Nashville, C. & St. L. Ry.* v. *Walters*, 294 U. S. 405, 430 (1935).

The solution, where this condition became particularly acute, was to require the construction of grade separations.

Though the need for a grade separation might be plain, the question of who was to pay the cost remained: the railroad with a virtual monopoly in transportation and fast and frequent trains, or the community, on behalf of users of the small, slow and infrequent highway vehicles then in service? As Mr. Justice Brandeis summed up the matter in his opinion for the Court in the *Nashville* case, *supra*:

> "Under those conditions the occasion for separation of grades was mainly the danger incident to rail operations; and the promotion of safety was then the main purpose of grade separation. Then, it was reasonable to impose upon the railroad a large part of the cost of eliminating grade crossings; and the imposition was rarely a hardship." 294 U. S. at p. 423.

Accordingly, when the question was first presented to this Court whether a railroad could be ordered, consistently with the Constitution, to construct a grade separation at its own expense, the answer was that it could; that since most of the highway vehicles then in use operated merely as feeders of passengers and freight to the railroads and were thus an incident of the railroads' own growth, a state's power to provide for the safety of its citizens was sufficient to overcome the railroad's claim that its property was being taken without Due Process of Law. See, *e. g.*, *Chicago, M. & St. P. R. Co.* v. *Minneapolis*, 232 U. S. 430 (1914); *Missouri Pacific R. Co.* v. *Omaha*, 235 U. S. 121 (1914); *Erie Railroad Co.* v. *Board of Public Utility Comrs.*, 254 U. S. 394 (1920). It is these cases upon which appellees principally rely.

2. *The Nashville Case*

By 1935, however, it had already become manifest to this Court that a "transportation revolution" had taken place.

Motor vehicle registration had increased from 55 thousand in 1904 to 26 million in 1935. In the same period, highway mileage had increased from 153 thousand to approximately 3 million and, in contrast, railroad mileage, after rising to a peak of 254 thousand in 1916, had declined to 241 thousand in 1935.

It was in the light of this marked change in the factors inducing grade separations that this Court considered *Nashville, C. & St. L. Ry.* v. *Walters*, 294 U. S. 405 (1935). The case involved the constitutionality of a Tennessee statute providing that in every case of construction of a grade separation the railroad must pay one-half of the total cost. A railroad ordered to pay 50% of the cost of an overpass challenged the order and the statute upon which it was based, claiming that the factors which, in the past, had been held to justify the imposition of such burdens on the railroads had undergone material changes. The Supreme Court of Tennessee refused to consider the evidence proffered to that effect, but this Court reversed.

The careful and detailed opinion of Mr. Justice Brandeis characterized the recent developments in the relation between rail and highway transportation as "the revolutionary change incident to transportation wrought in recent years by the widespread introduction of motor vehicles."[8]

[8] Only two years later, and shortly after it was given regulatory power over the transportation of property by motor carriers the Interstate Commerce Commission reported to the Congress as follows:

> "Whether it realizes it or not, the country has in fact experienced a transportation revolution in a very short space of time. The automotive highway vehicle has been the principal factor in this revolution. In the carriage of persons, it is now by far the most important means of transportation, and in the carriage of property it is growing in importance every day." 52 Annual Report of ICC (1938), p. 17.

Earlier the Commission had said:

> "Competition of the bus and truck is a development of recent years, but it is the most formidable which confronts the railroads." 45 Annual Report (1931), p. 98.

On the basis of this fundamental development he noted two conclusions: (1) Grade separations are no longer constructed primarily for reasons of safety, for the railroad has ceased to be the main cause of accidents; they are now essentially economic improvements designed to further the "uninterrupted, rapid movement by motor vehicles," and are comparable to widening the highway, removing curves, shortening distances, etc. (2) the competitive position of the railroads as against trucks, busses and other users of the highways has changed radically in recent years. The opinion points out:

> "Separation of grades serves to intensify the motor competition and to further deplete rail traffic." 294 U. S. at p. 423.

Thus, to require the railroad to bear an arbitrary apportionment of the cost of a grade separation which exceeds the benefit it receives is to make it subsidize its powerful and growing competitors.

In view of this complete inversion of positions and purposes, this Court held that an arbitrary assessment against a railroad of 50% of the cost of a grade separation could not be sustained. The constitutional standard of allocation of costs was stated clearly and unequivocally:

> "* * * when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured. [citations] While moneys raised by general taxation may constitutionally be applied to purposes from which the individual taxed may receive no benefit, and indeed, suffer serious detriment; [citations] *so-called assessments for public improvements laid upon particular property owners are ordinarily constitutional only if based on benefits received by them*

[citations]." 294 U. S. at pp. 429-430 (Emphasis supplied.)

Nothing that this or any other court has said since impinges to the slightest degree upon this principle. On the contrary, the experience of each succeeding year has verified its wisdom.

3. *The Commission's Action*

The action of the California Commission in rejecting the Santa Fe's contention that the allocation of costs of the Washington Boulevard grade separation is "constitutional only if based on benefits received by them" is strange and inexplicable. It is strange because it represents a departure by the Commission from a "benefit" standard, which it recognized and applied for 16 years, and a return to its former practice of making an arbitrary 50% allocation to the railroad regardless of the benefit the railroad receives from the separation.[1] The order is inexplicable because the circumstances which caused it to adopt the "benefit" standard in the early 1930's have become more compelling with every passing year. Moreover, its about-face is contrary to recent recommendations and action by experts and legislative bodies throughout the country.

In 1932, in a decision approving the widening of the very underpasses which are here again involved, the Commission allocated 25% of the cost to the Santa Fe and 75% to the

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[1] Since the allocation to the Santa Fe of 50% of the costs of constructing the grade separation by the Commission in the instant case was admittedly based upon no particular standard, the Commission's order is identical in substance and effect with the 50% allocation provision of the Tennessee statute involved in the *Nashville* case. Shortly after its decision in this case, the Commission ordered the Southern Pacific Company to pay 50% of the cost of constructing a new $1,493,200 grade separation just outside the City of Los Angeles—again without relation to any benefits which that company will receive therefrom. That order is now before the Supreme Court of California on the Southern Pacific's Petition for Writ of Review.

City. In making that allocation on the basis of the then existing facts, the Commission recognized the principles adopted by this Court three years later in the *Nashville* case, as follows:

> "There can be no question that the vehicular public will receive the greatest benefit from the widening of these separations, so it logically follows that this class of the public should bear the greater portion of the cost." *Application of the City of Los Angeles*, 37 C.R.C. 784, 787 (1932).

And the following year the Commission further anticipated this Court's decision in the *Nashville case* by allocating costs of grade separations primarily upon the basis of actual benefit to the railroad. *Application of the Department of Public Works*, 38 C.R.C. 380 (1933). In language strikingly like that of this Court, the Commission said:

> "In allocating the costs here *we are departing from the practice which has obtained generally heretofore*, of assessing one-half to each the public and the railroad in case of an existing grade crossing. While this procedure has appeared equitable in the past, *the tremendous changes in transportation conditions make necessary a reappraisement of the liabilities of the two parties at interest.* The railroad still continues to be the aggressor in preventing the free and unhampered use of the public thoroughfare, but the needs of the traffic on the highway have not only increased and changed in nature, but the use of the highway has become in large measure directly competitive with the rail line. These and incidental conditions following them have changed the benefits flowing from the separation of grades between these two great avenues of traffic.
>
> "After carefully considering all the evidence in these proceedings, it is concluded that the order should authorize the grade separation, as proposed, and fix the amount to be contributed by the railroad in a lump sum

based upon direct and indirect benefits * * *" 38 C. R. C. at p. 386. (Emphasis supplied.)

Allocation of costs upon the basis of benefits to the railroad, as required by the *Nashville* case, remained the rule in California until decision of the case here on appeal. For 16 years the Commission allocated grade separation costs to the railroads on the basis of benefits received without experiencing any difficulty. Now, however, the Commission has returned to the practice of earlier days, holding "that the allocation of costs herein is an exercise of the police power, and that we are not bound to follow the benefit theory." (Appendix B, *infra*.)

A most extraordinary feature of the Commission's abrupt return to the practice which it had followed prior to 1932, is the fact that the asserted reason therefor is that "the great increase in population and the tremendous increase in motor vehicle traffic present *a new problem*." (Appendix B, *infra*.) The Commission is thus saying that the very conditions which led that body, in 1932 and 1933, and this Court in 1935, to abjure the imposition of an arbitrary assessment of grade separation costs upon the railroads, although magnified many times in the interim, now lead the Commission back to its precise point of departure twenty years ago. In other words, the marked progression of the very changes which posed *a new problem* in the early 1930's and required the Commission, as it declared, to make a rational and equitable distribution of the cost of grade separations on the basis of relative benefits, is now said to present *a new problem* which warrants a reversion to arbitrary action.

(a) *The Present Position of the Railroads*

A tremendous intensification of highway traffic has worked the transformation of the highways from the role of railroad feeders into a vast, independent system of trans-

portation, competitive with the railroads and promising to dwarf them. The trends noted by Mr. Justice Brandeis in the *Nashville* case have continued and accelerated in the years since that case was decided. It is beyond question that the "revolutionary change" noted by the Court and the Interstate Commerce Commission [8] has become progressively more extreme, as the following comparisons illustrate.

From 1904 to 1949, highway mileage increased from 153,662 to 3,326,000. In contrast, railroad mileage reached a peak of 254,000 in 1916 and, by 1949, had declined to 225,000.

The number of registered motor vehicles in the United States increased from *65 thousand* in 1904 to a little over *26 million* in 1935 and to more than *44 million* in 1949. In contrast to that phenomenal multiplication of motor vehicles, railroad equipment in service has shown a declining trend. Passenger cars in service decreased some 27 per cent from 1916 to 1949, locomotives in service declined 34 per cent during the same period while freight cars in service showed a decrease of 22 per cent. The physical facilities of these competing industries mark the continuing growth of motor vehicle transportation and the relative decline in the position of the railroads.

The increase in the proportion of all commercial traffic handled by motor vehicles has also been spectacular. In 1925, the railroads hauled 77.4 per cent of the commercial intercity freight traffic while the trucks hauled 2.1 per cent. *Pacific Intermountain Express Co.—Control and Purchase*, 37 M. C. C. 341,365. By 1940, the change noted in the *Nashville* case had become unmistakable. Railroad participation in total freight traffic had decreased to 62.3 per cent but the trucks had quadrupled their proportion to 8.4 per cent of the total. In 1950, the relevant figures showed

[8] See footnote 6, *supra*.

a further decrease in the railroads' share of freight traffic to a low point of 58.7 per cent, while the trucks hauled 12.4 per cent of the total intercity freight traffic. 65th Annual Report of I. C. C., p. 20. This represented another increase of approximately 50 per cent for the motor vehicle competitors of the railroads.

The shift of short-haul, local business to the trucks has been even more extreme. For example, in 1949, the steam railroads handled only 20.9% of California intra-state business; the highway carriers hauled 73.7%. What has happened in the field of passenger traffic is equally striking. The railroad percentage of the passenger traffic business, excluding that moving by private automobile, declined from 75.7 per cent in 1926 to 62.1 per cent in 1936 and 50.5 per cent in 1950. Report of Special Committee of National Association of Railroad and Utilities Commissioners dated November 11, 1952, p. 66. During this same period of time, the proportion hauled by the busses increased from 9.3 per cent of the total in 1926 to 29 per cent in 1936 and 33.8 per cent in 1950. But the "revolution" has been most drastic in the shift of the railroad passenger business to the private automobile. In 1936, automobiles accounted for over 197 billion *intercity* passenger miles, while in 1950 the total for automobiles was over 337 billion, which represents 84.34 per cent of the total intercity passenger miles for that year. (*Ibid.*) It is thus plain that the change which the Court emphasized in the *Nashville* case has persisted and gained momentum in the years since.

In the *Nashville* case this Court also stressed the fact that in the days before motor vehicles became commercially important:

> "* * * the need for eliminating existing crossings, and the need of new highways free from grade crossings, arose usually from the growth of the community in which the grade separation was made; this growth

tion arising under the Constitution of the United States. They are also important, however, because they represent and epitomize a phenomenon that is presently being experienced in every state of the union. That phenomenon is the growth of truck, bus and automobile traffic upon the highways and the consequent agitation for elimination of more and more grade crossings and for enlargement of existing grade separation solely for the purpose of speeding up and thus reducing the cost of the highway traffic.

We can submit no better description of the forces at work than that contained in the Commission's original opinion in this case (Appendix A, *infra*):

> "The area in the vicinity of the two underpasses here under consideration has become one of the leading industrial areas of Los Angeles and its environs. As a result, there is a large amount of motor truck traffic hauling to and from these areas. The reasons advanced by applicant [the City] for widening the underpasses, which reasons were not disputed by protestant [the Santa Fe], were the increase in motor vehicle traffic, both passenger and commercial, the need to make Washington Boulevard a through street for its entire length, the need for a bus line to transport passengers through that area, and the inadequate height of the present underpass."

It is thus apparent, and quite beyond dispute, that the sole reason for the new construction is to speed the flow and hence lower the cost of vehicular traffic, a large proportion of which is in direct competition with the railroad.

In the State of California alone there was a total of 13,130 grade crossings in 1949. In addition, there were 809 grade separations. The economic pressures that have operated to make six lane underpasses desirable along Washington Boulevard are operating at countless other locations in California and outside California. The poten-

tial cost of eliminating all grade crossings in California has been estimated by the Commission itself at approximately two and one-half billion dollars! The consequences of the Commission's return to the rigid pattern of an arbitrary 50% allocation of costs to the railroads are thus of momentous importance.

Conclusion

The present appeal is a test case. The ultimate issue necessarily presented is whether this Court's decision in the *Nashville* case is to be qualified or overruled, for it is submitted that the Commission's order is in direct conflict with this Court's opinion and judgment. We respectfully suggest that the Court's appellate jurisdiction has been properly invoked, that the federal questions involved are substantial in merit and that the importance of the issues warrants this Court's consideration of the appeal upon full briefs and argument.

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Of Counsel.

the construction of the separation.[4] Since it concluded that, under the police power, its authority to thrust upon the railroad the full burden of the cost of the underpasses is unbridled by any countervailing constitutional limitations, it did not attempt or pretend to justify on any factual or logical basis the assessment of less than the full cost. In short, the 50% cost allocation to the Santa Fe is acknowledged to be wholly arbitrary in that it does not purport to represent a reasoned judgment based upon "benefits received" or, indeed, to reflect any particular standard of allocation of costs. The record before the Commission showed the benefit to the Santa Fe to be far less than the assessment against it. The Commission does not and can not deny this. On the ground that it was exercising police power it refused to measure the benefits to the railroad or to allocate the costs of the improvement on that basis.

Upon denial by the Commission of appellant's petition for further rehearing, the Santa Fe filed a Petition for Writ of Review in the California Supreme Court, supported by a detailed Memorandum of Points and Authorities. That court denied the petition, two judges dissenting, after which an appeal was taken to this Court within the time fixed by statute.

The Questions Presented Are Substantial

A vast and mounting volume of highway traffic is crossing and crisscrossing railroad rights-of-way everywhere in a pattern of growing complexity. As a result, the circumstances of this case are not unique. The issues here presented are now being contested in a great number of pro-

[4] The Commission stated in passing (Appendix B, *infra*): "we observe that this proposed improvement is not without benefits to the railroad," but it made no pretense of assessing the value of such benefits and specifically rejected the benefit standard for the allocation of costs adopted by this Court in the *Nashville case*.

ceedings pending before state courts and commissions, and many more are in the process of incubation. Moreover, the question of the proper legal standards for allocation of grade separation costs poses a basic constitutional problem of accommodation between users of the highway and the railroads at points of their intersection. Finally, the Commission's order directly and flagrantly violates the constitutional principles which this Court, speaking through Mr. Justice Brandeis, held applicable in making the necessary accommodation of interests at the points of intersection of rail and highway traffic. *Nashville, C. & St. L. Ry.* v. *Walters*, 294 U. S. 405 (1935). The scope of the problem will be sketched briefly to indicate the substantiality of the questions presented.[8]

1. *The Background of the Problem*

It has often been remarked that America lives on wheels. The difficulties created by this mobility are manifold and not the least of these problems is that of accommodating the needs of railroad and highway traffic at points where they intersect.

Early in our country's history the slow speeds and meager travel upon both railroads and highways made rail-highway grade crossings of relatively little danger or inconvenience. During the latter part of the 19th Century and the early part of the 20th Century, however, railroad mileage grew by leaps and bounds, and railroads far outstripped highway conveyances as carriers of passengers and freight. Railroad trains became relatively frequent and swift, with the result that grade crossings became increasingly dangerous.

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[8] The authority of the Commission to order construction of the grade separations here involved, the desirability of speeding an increasing flow of highway traffic through the underpasses, and the accuracy of the cost estimates are not here in issue.

was mainly the result of the transportation facilities offered through the railroad; the separation of grade crossings was a normal incident of the growth of rail operations; and as the highways were then feeders of rail traffic, the community's growth and every improvement of highway facilities benefited the railroad." 294 U. S. at p. 423.

While there has been a very significant growth of the community here involved in recent years,[9] that growth reflects and is reflected by the great increase in *highway* traffic. During the same period, on the other hand, railroad facilities have remained relatively static.

There is no possible justification, therefore, for the Commission's refusal to follow the principles enunciated in the *Nashville* case. On the contrary, the changes in the competitive picture since that time fortify the reasoning of this Court and compel adherence to the path marked by its decision in that case.

(b) *Recent Informed Approach to the Problem*

If continuing research and informed public opinion had cast doubt on the principles set out in the *Nashville* case, the Commission might have attempted to justify its action on the ground that reconsideration of the "relative benefit principle" is essential. The fact is, however, that critical appraisals of the grade separation problem have clearly and unanimously approved this Court's recognition of the fundamental change in the relationship between railroad and highway traffic and its effect upon allocation of the costs.

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[9] Census figures show that from 1930 to 1940, the population of the State of California increased by about 52 per cent, and from 1940 to 1950 the increase was 53.3 per cent. For Los Angeles County, the population growth from 1930 to 1950 was approximately 100 per cent.

The most recent and complete study of the problem is a monograph published by the Stanford Research Institute.[10] Much that is there said is relevant to the problems here presented and is commended to the Court's attention. The Institute's approach may be indicated by this paragraph (at pp. 45-46):

> "The need for grade crossing improvements and eliminations arises only because of the demands of the various beneficiary groups for transportation service. In order to justify such improvements from an economic standpoint, it is necessary to take into account the demands of the various groups for the improvements. Sufficiently accurate measurements of the various demands can be determined by measuring the benefits each group at interest will derive from the improvements. The relative dollar values of these economic benefits must be the basis for distribution of the costs to each group."

The institute dismisses the policy adopted by the Commission in this case of assigning costs to the railroad on the basis of an arbitrary percentage of total costs as:

> "* * * no more realistic or economically sound than is an assumption that the economic nature and character of the grade crossing area, crossing usage, and highway development and usage may be identical as between grade crossings" (p. 47).

Other evidence of informed thinking on the subject is provided by the fact that Congress and a number of state legislatures have, since the *Nashville* case was decided, enacted statutes providing for allocation of grade separation costs to the railroads on a benefit basis, generally with a maximum assessment upon the railroads of from 10 to

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[10] *The Railway-Highway Grade Crossing Problem* (The Stanford University Press, 1952.) Copies of this monograph are being furnished to the Clerk of this Court for its judicial notice.

25 per cent.[11] An Indiana Highway Commission official states that:

> "This legislation can be considered an indication of the trend of popular thought on this subject. Previous laws in Indiana required the railroads to bear one-half the cost of such installations." Milner, *Danger or Delay*, 35 National Safety News (May, 1937) 11, 12.

It can hardly be denied, therefore, that in reverting to an arbitrary 50—50 allocation basis, the Commission has disregarded not only the governing declarations of this Court on the subject but the informed judgment of experts and the "trend of popular thought on this subject."

In addition, and particularly in view of the magnitude of the problem presented, the principles applied below plainly constitute an undue and ever increasing burden on interstate commerce contrary to the Commerce Clause of the Constitution and the National Transportation Policy, enacted by Congress to implement that Clause.[12]

In *King* v. *United States*, 344 U. S. 254, 262 (1952), this Court expressly recognized as a pressing problem in implementing the National Transportation Policy as to the railroads,

> "the growth of vigorous competition from automobiles and other forms of transportation which made it futile

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[11] Federal: Federal Aid Highway Act of 1944, 58 Stats. 838 (10%); Indiana (20%); Maryland (25%); Michigan (15%); New Jersey (15%); New Mexico (10%); New York (15%); Ohio (15%); West Virginia (10%).

[12] "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers; * * * all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense" 54 Stat. 899 (1940).

to compensate for the passenger deficit by increasing passenger rates.

The same competitive problem has also been emphasized by the Interstate Commerce Commission in connection with the diversion, particularly in recent years, of freight traffic from railroads to trucks and other carriers. *Ex Parte 168*, 276 ICC 9, 46 (1949). This increasing competition, together with rising costs, has held the railroads to "substandard" rates of return in spite of a series of post-war rate increases. *Ex Parte 175*, 284 ICC 589, 612 (1952). These conditions have caused a Congressional Committee to express concern as to the "precarious financial position" of the railroads. Sub-Committee of the Senate Committee on Interstate and Foreign Commerce, Sen. Rep. No. 1039, 82d Cong., 1st Sess. 46 (1951).

The imposition of grade separation costs upon the railroads at once increases their operating costs and reduces those of highway carriers, thus improving the already strong competitive position of the latter. The Commission's new policy, if not reviewed by this Court, will thus impose expenses upon the railroads which simply can not be met, thereby accentuating the difficulty of preserving an adequate national transportation system.[18]

4. *The Importance of This Appeal*

The facts of this case are, of course, important in that they constitute the framework upon which is woven a ques-

[18] Under the rigid formula now being applied by the Commission, the railroad is not only required to pay one-half the cost of the improvement, without regard to any benefits received, but as a large taxpayer of the city and state must participate substantially also in bearing the other half of the cost. This double burden is given emphasis by the facts recited by this Court in the Nashville case, that nearly 28% of the railroad's gross revenues is required annually to pay state and local taxes plus cost of maintaining its roadway, whereas commercial motor carriers moving on public roads pay not more than 7% of their gross revenues in state and local taxes (294 U.S. at pp. 427-8).

APPENDIX "A"

Decision No. 43374

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application No. 29396

In the Matter of the Application of THE CITY OF LOS ANGELES, a municipal corporation

OPINION

The petition of the City of Los Angeles, applicant herein, concerns the proposed widening and increasing of the vertical clearance of two grade separation crossings of Washington Boulevard and the Harbor Branch line [14] and the main line [15] railroads of The Atchison, Topeka and Santa Fe Railway Company. The petition alleges that the present grade separations are inadequate to meet the present demands of vehicular traffic in that they are too narrow and the vertical clearances are too low. Applicant requests that this Commission issue its order authorizing and requiring the proposed improvements, and also designating the work

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[14] This crossing is designated as Crossing No. 2H-0.1-B, and legal description is as follows:

That portion of the right of way, 66 feet wide, of The Atchison, Topeka and Santa Fe Railway Company (formerly of the California Central Railway Company), described in Deed recorded in Book 491, page 106, of Deeds, Records of said County, included within the lines of Washington Boulevard, 90 feet wide, at Harriett Street.

[15] This crossing is designated as Crossing No. 2-143.2-B, and the legal description is as follows:

That portion of the right of way, 100 feet wide, of The Atchison, Topeka and Santa Fe Railway Company (formerly of the California Central Railway Company), described in Judgment of Condemnation had in Case No. 6855 of the Superior Court of the State of California in and for the County of Los Angeles, a copy of which judgment is recorded in Book 361, page 77, of Deeds, Records of said County, included within the lines of Washington Boulevard, 90 feet wide at Harriett Street.

to be done and the costs to be apportioned to each of the parties hereto.

Protestant, The Atchison, Topeka and Santa Fe Railway Company, in its answer to the above-mentioned petition, denies, upon information and belief, any need for changing the existing grade separation crossings, and further alleges that the present crossings are wholly sufficient for the needs of the railroad and the convenience and necessity of the public using the railroad facilities. Respondent contends that, since it will receive no benefit from the proposed changes, and since any alleged need for these changes has been occasioned, not by the railroad activities, but by automotive traffic using the highway, it should not be required to bear any of the costs of changes that might be made.

Public hearing was held in Los Angeles, California, on December 6, 1948, before Examiner Syphers, at which time evidence was adduced and the matter submitted, the parties being granted permission to file written briefs. Applicant has filed opening and closing briefs, and protestant has filed a reply brief. The matter is now ready for decision.

Washington Boulevard is a public street extending from the westerly boundary of the city at the Pacific Ocean, in the Venice area, easterly through the entire breadth of the city and for a distance of several miles east of the easterly boundary of the city.[16] In the vicinity of the grade separation crossings here under consideration, Washington Boulevard traverses one of the principal industrial districts of the Los Angeles area. Throughout most of its length, Washington Boulevard has a paved surface at least 60 feet in width, with some exceptions where the pavement width varies from 40 to 60 feet. However, at the site of the two crossings hereunder consideration, the pavement narrows down to 20 feet in width while the street easement at these points is 90 feet. The vertical clearance of these grade separations is between 13 and 14 feet.

Witnesses for applicant testified as to the need for enlarging these two grade separation crossings. Due to the

[16] Exhibit 8 is a map of Washington Boulevard.

rapid increase in population in Los Angeles City and also in the county, the automobile traffic has greatly increased. This has caused a congested condition at the site of the two crossings in question inasmuch as the underpasses are too narrow and too low to permit a free flow of traffic. It is very difficult for trucks to pass each other in the underpasses, and some of the larger vehicles cannot safely go under the underpasses because of their height. All of these factors, in addition to causing congestion at the site of the underpasses, also cause a diversion of traffic. Vehicles turn to other streets, and studies [17] made by the principal traffic engineer of the City of Los Angeles show heavy turning movements at intersections in the vicinity of the underpasses. These heavy turning movements create safety hazards at the intersections where they are made.

Exhibits 3 to 7 inclusive are photographs of the two underpasses and corroborate the description of the conditions there existing as given by various witnesses.

Some of applicant's witnesses testified that there was a need for public bus transportation along Washington Boulevard in the vicinity of the underpasses but that the inadequacy of these underpasses has deterred the institution of such bus service. Other testimony was to the effect that it is becoming increasingly important to have through highways in Los Angeles. Washington Boulevard, for the greater part of its length, is a through highway and the widening of the underpasses in question would make it a through highway for its entire length. Furthermore, Washington Boulevard is one of the streets which has a bridge crossing the Los Angeles River.

The two grade separation crossings here under consideration were constructed in 1914 pursuant to an agreement between the City of Los Angeles and The Atchison, Topeka and Santa Fe Railway Company. The costs were borne one-half by the city and one-half by the railroad. In 1926 an additional superstructure for another track was installed and the entire cost of this was paid for by the railroad.

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[17] Exhibit 2 shows the results of a traffic check made by the City of Los Angeles as to the hourly volume of vehicles and the right and left turns at intersections in the vicinity of the two underpasses

Three proposals are advanced by the applicant. One is to fill in the present separation and have the crossings at grade. The second is to use the present grade separations for east-bound traffic and build a new west-bound roadway at grade. The third is to widen and increase the height of the existing underpasses and maintain the grade separation. The last of these proposals is the one most strongly advocated. Also, the testimony shows that a grade separation is the most desirable type of crossing for this situation, in that the volume of traffic is too heavy to satisfactorily and safely be handled over a grade crossing.

The total cost of widening the present underpasses and constructing new bridges is estimated to be $722,100,[18] and exhibits were introduced at the hearing showing the details of this contemplated improvement.[19] A breakdown of the estimated costs was given by an engineer who testified for applicant, as follows:

Two span-deck girder railway bridges,		
One west of Harriet Street	$192,000	
One east of Harriet Street	204,000	$396,000
Structure wing walls, and walls between structures		79,800
Storm drain, sewer		240,550
Slope rights		5,750
Total		$722,100

An analysis of all of the evidence presented herein shows that there is practically no dispute as to the factual situation. The testimony and exhibits showing the desirability and need of widening the existing underpasses and providing more vertical clearance were not seriously challenged nor controverted. Likewise, the estimated cost of the proposed improvements was not challenged. The issue in the matter, therefore, resolves itself into a legal inquiry. What portion of the costs, if any, shall be borne by the railroad?

[18] Exhibit 12.

[19] Exhibits 9, 10, 11, and 13.

In considering this question we have had the benefit of applicant's opening and closing briefs and protestant's reply brief.

The City of Los Angeles contends that the railroad should bear that portion of the costs which the existence of the railroad tracks add to the cost of the proposed improvement. Under this contention it is argued that the City of Los Angeles should pay only that cost of widening the street which it would pay if there were no railroad crossing; all other costs, such as the cost of the bridge and its supports, should be borne by the railroad. The public, it is contended, should not be required to pay additional costs for street improvements when these additional costs are occasioned by the presence of the railroad.

The protestant railroad takes the position that costs should be allocated according to benefits received. It contends that the railroad will receive no benefits from the proposed widening since it is now operating satisfactorily and the widening of the street will in no way change these operations. As a matter of fact, the railroad contends the proposed improvements will actually be a detriment since there will be increased costs involved in maintaining the longer bridge. It contends that the need for widening the underpasses has arisen, not because of any activity of the railroad, but because of the increase in motor vehicle and pedestrian traffic.

In 1932 these same parties were before this Commission in a similar proceeding involving the same two crossings.[20] At that time the proposal of the City of Los Angeles was to widen the two grade separations so that the roadway under them would have a width of 56 feet. This commission issued its order authorizing widening of the grade separations and holding that the costs should be borne "25 per cent by The Atchison, Topeka and Santa Fe Railway Company and 75 per cent by applicant". The order further provided that the authorization therein granted should lapse and become void if not exercised within one year from

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[20] Decision No. 25069, dated 8/15/32, in Application No. 18063, 37 CRC 784.

the date thereof. The authorization was not exercised and, therefore, lapsed according to its terms.

As pointed out by applicant in its closing brief, we cannot now fail to take note of the material change in conditions at the present time as compared to those in 1932, at the time of Decision No. 25069, supra. The great increase in population and the tremendous increase in motor vehicle traffic present a new problem.

According to the evidence presented, the widening of the underpass is now necessitated by the increase in vehicular and pedestrian traffic. The area in the vicinity of the two underpasses here under consideration has become one of the leading industrial areas of Los Angeles and its environs. As a result, there is a large amount of motor truck traffic hauling to and from these areas. The reasons advanced by applicant for widening the underpasses, which reasons were not disputed by protestant, were the increase in motor vehicle traffic, both passenger and commercial, the need to make Washington Boulevard a through street for its entire length, the need for a bus line to transport passengers through that area, and the inadequate height of the present underpass. It was pointed out that the height of the underpass should be increased so as to provide adequate clearance for commercial vehicles. All of these factors have resulted in a congestion of traffic in the area of the underpasses, and the diversion of traffic to other streets, which diversion is felt even in the central business district of Los Angeles.

The protestant railway company contends that none of these factors are due to the operation of the railroad; that the railway operations are being conducted satisfactorily over the present underpasses. A fair view of all of the evidence presented in this matter supports this contention. Thus we are specifically faced with the problem of who shall pay the cost of widening of the underpass where the necessity for such widening is not due to the activities of the railroad but rather to the needs of the automotive and pedestrian traffic.

The applicant city relies rather strongly on the proposition that the proposed improvement is an exercise of the

police power and that, therefore, it is distinguishable from similar situations involving federal aid highways. Exhibit No. 20, introduced in evidence, is a copy of General Administrative Memorandum 325 of the Public Roads Administration, Federal Works Agency, of the United States Government. This particular memorandum sets out the policy of the federal agency to be that the costs assessed against the railroad in such situations shall be based upon the benefits accruing to the railroad and, in no case, shall costs be greater than 10% of the total cost of the project. In the case of reconstruction of existing rail-highway grade separation structures, the memorandum states that such reconstruction "shall be considered as not resulting in ascertainable benefits to the railroad and, consequently, no contribution to the cost of such a project by the railroad shall be required."

We find that the situation presented in the matter before us is differentiable from those grade crossing and grade separation situations involving federal aid highways, since Washington Boulevard is a city street and no federal funds are to be used in the proposed widening.

Applicant city, in its brief, set out at some length the authority of this Commission to require grade separations and allocate the costs thereof. These contentions are not challenged and there is no question as to the jurisdiction and power of this Commission in this matter to allocate costs within legal and constitutional limitations. However, in considering these costs, a sound policy requires that the allocations be reasonable and equitable. We must take cognizance of present-day conditions, and in this particular instance we are impressed not only by the fact that the need for the proposed improvements is not brought about by any requirement of the railroad, but also by the fact that, but for the existence of the railroad at the location of the proposed street widening and the grade separation structures now there, the city would be able to widen its street without the necessity of incurring the cost of replacing the existing bridge and underpass structures with the new structures proposed.

If the contentions of the City of Los Angeles were to be

sustained, then the railroad would be required to pay $475,800, that amount being the cost of the two proposed bridges and the structure wing walls and walls between the structures. The City of Los Angeles would be required to pay $246,300, that being the cost of the proposed improvements other than that cost necessitated by the existence of the railroad. We do not subscribe to this contention. Within its proper limitations, the police power of the City of Los Angeles is not challenged. However, we must also consider the fact that protestant railway has already paid its proportionate share of the existing structures.

The pavement under the existing underpasses is 20 feet in width and the proposal is to widen this so as to permit a 90-foot roadway thereunder, but, an analysis of other evidence presented in this record shows that the widening of these underpasses to 90 feet will not increase the traffic capacity of the street to that extent. The Washington Boulevard bridge over the Los Angeles River is only 56 feet in width and is located east of the underpasses and west of Soto Street, with no cross streets between the underpasses and this bridge. Accordingly, it is obvious that the practical carrying capacity of the street beyond the underpasses would be limited to 56 feet.

In view of this situation, and in view of the evidence which indicates that the principal need for widening the underpasses is occasioned by traffic conditions on Washington Boulevard, we conclude that the proposed additional width of the underpasses, over and above 56 feet, becomes a matter of future city planning and will not contribute to the immediate traffic problem.

The Commission in *City of Los Angeles* Application No. 18063, Decision No. 25069, 37 CRC, 784 at 786-7 said: "The matter of direct financial benefits is not the sole test in the determination of the respective portions which the railroad and public should contribute toward the cost of such improvement. In apportioning the cost of constructing these separations between applicant and the railroad company, due consideration should be given to the obligations of each party, as well as to the benefits derived. It

should be recognized that the railroad has a continual obligation to participate in the matter of constructing and maintaining reasonable adequate crossing over its tracks both at grade and at separated grades. This obligation is inherent, notwithstanding the fact that the traffic on the railroad may increase or decrease."

We believe that the railroad has a continuing obligation to participate in the cost of such an improvement as is contemplated. Therefore, in considering any allocation of costs, the extent of the additional cost for bridge structures for the widening of the street over and above a 56-foot width should be allocated to the city.

As previously has been pointed out, the total cost of the proposed improvement will be $722,100, but the cost attributable to the presence of the railroad is $475,800. The remainder of the cost is clearly attributable to the paving and widening of the street. Of the proposed 90 feet of roadway, 20 feet is now available under the existing underpasses and the excess over 56 feet, or 34 feet, is attributable to future city planning. Therefore, this leaves but 36 feet of the proposed railway bridges, the costs of which are in any way attributable to the existence of the railway. These costs would amount to 40% of $475,800, or $190,320.

We conclude that this last-named amount is the only cost which should be allocated in this proceeding. In allocating this amount of $190,320 between the applicant city and the protestant railroad, we give effect to the factual situation as presented by the evidence in this case. A fair view of this evidence warrants the conclusion that each of the parties should defray one-half of this amount.

After considering all the evidence presented in this matter we hereby find that public convenience and necessity have been shown to justify the widening of the existing grade separations, and we further find that there is a duty upon the protestant railway to defray a portion of the costs of such widening, as set out hereinabove.

Order

Application as above entitled having been filed, a public hearing having been held and the Commission being fully advised in the premises,

It is ordered that the City of Los Angeles be, and it hereby is, authorized to widen and increase the height of the existing underpasses of Washington Boulevard and the Harbor Branch Line and the main line railroads of The Atchison, Topeka and Santa Fe Railway Company in the manner and at the locations more particularly described in the foregoing opinion, and substantially in accordance with the plan introduced in evidence in this proceeding, subject to the following conditions:

1. The expense of constructing said undergrade crossings shall be borne by the City of Los Angeles with the exception of the sum of $95,160, which amount shall be borne by The Atchison, Topeka and Santa Fe Railway Company.

2. In the event applicant elects to construct said undergrade crossings, the cost of maintaining those portions of the separations which, for the purpose of this decision, shall be referred to as the superstructures, which shall be deemed to be everything above the bridge seats, shall be borne by The Atchison, Topeka and Santa Fe Railway Company. The remainder of the maintenance of said structures shall be borne by applicant.

3. Prior to the commencement of construction, applicant shall file with this Commission for approval a set of plans for the proposed grade separation crossings which plans shall have been approved by The Atchison, Topeka and Santa Fe Railway Company, or bear a statement as to why the said railway company refuses to approve such plans. In the event the said railway company refuses to approve such plans, this Commission may issue supplementary orders in this matter.

4. The crossing shall be constructed with clearances conforming to the provisions of General Order 26D of this Commission.

5. Applicant within thirty (30) days thereafter shall notify this Commission, in writing, of the completion of the installation of said crossings and of its compliance with the conditions hereof.

6. The authorization herein granted shall lapse and become void if not exercised within one year after the date hereof unless further time is granted by subsequent order.

The effective date of this order shall be twenty (20) days after the date hereof.

Dated at San Francisco, California, this 4th day of October, 1949.

R. E. MITTELSTAEDT,
JUSTUS F. CRAEMER,
IRA H. POWELL,
HAROLD P. HULS,
KENNETH POTTER,
Commissioners.

APPENDIX B

Decision No. 47344

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of The CITY OF LOS ANGELES, a Municipal Corporation

Application No. 29396

OPINION ON REHEARING

By decision No. 43374, dated October 4, 1949, on Application No. 29396, the City of Los Angeles was authorized to widen and increase the height of the existing underpasses of Washington Boulevard and the Harbor Branch Line and the main line railroads of The Atchison, Topeka & Santa Fe Railway Company, in the manner therein prescribed and subject to certain specified conditions. The decision further provided that the expense of constructing the undergrade crossings was to be borne by the City of Los Angeles with the exception of the sum of $95,160, which amount was to be borne by The Atchison, Topeka & Santa Fe Railway

Company. Subsequently, the effective date of this order was extended sixty days.

Under date of November 22, 1949, the City of Los Angeles filed a petition for rehearing alleging that the decision was contrary to the law and the facts in that it assumed the City to be the principal beneficiary and disregarded the City's right to require the railroad to remove the tracks, that the proposed widening and increasing of the height of the underpasses are necessary in order to remove the railroad's interference with the City's easement for street purposes, which easement allegedly includes the "right to prevent any use of the ground beneath or the space above the easement in any manner which directly or indirectly interferes with the full utilization of such easement for street purposes", that the order of the Commission is in conflict with the Constitution of the State of California, Sections 6 and 8 of Article XI, in that the City "receives no legal benefit from the grade separation" since it allegedly has the right to "use its streets unimpeded and unhindered by the existence of the tracks", that the formula adopted by the Commission to allocate costs is prejudicial to the City and has been improperly and incorrectly applied, and that the railroad should be required "to pay the full cost of the proposed improvement which is attributable to the presence of protestant's tracks."

Under date of December 2, 1949, The Atchison, Topeka & Santa Fe Railway Company likewise filed a petition for rehearing alleging that the Commission's conclusion is erroneous and contrary to law in assessing certain costs to the railroad since the City is the sole beneficiary of the proposed structure, that the proposed structure actually will be a detriment to the railroad, that the "benefit" theory should be followed in assessing costs, and that the assessing of costs to the railroad amounts to a taking of property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States and Article I, Section 13 of the Constitution of the State of California.

The Commission's order granting a rehearing was issued March 28, 1950, and public hearings were held thereon before Commissioner Huls and Examiner Syphers on De-

cember 27 and 28, 1950, February 2 and 5, and March 19, 1951. On these dates evidence was adduced and on the last-named date the matter was submitted, with the parties being given the right to file briefs. The last of these briefs was filed June 29, 1951. At the request of the parties, the Commission en banc heard oral argument on this matter on November 28, 1951. It is now ready for decision.

At the hearing all parties entered into a stipulation to the effect that all evidence in the prior hearings in this matter, leading to Decision No. 43374, supra, be incorporated in this record. This stipulation was accepted.

The crossings which it is proposed to widen and to increase in height are described as follows: Crossing No. 2H-O.1-B is the numerical designation of the crossing of Washington Boulevard and the Harbor Branch line. Its legal description is:

> That portion of the right of way, 66 feet wide, of The Atchison, Topeka & Santa Fe Railway Company (formerly of the California Central Railway Company), described in Deed recorded in Book 491, page 106, of Deeds, Records of said County, included within the lines of Washington Boulevard, 90 feet wide, at Harriett Street.

Crossing No. 2-143.2-B is the numerical designation of the crossing of Washington Boulevard and the main line of applicant. Its legal description is:

> That portion of the right of way, 100 feet wide, of The Atchison, Topeka & Santa Fe Railway Company (formerly of the California Central Railway Company), described in Judgment of Condemnation had in Case No. 6855 of the Superior Court of the State of California in and for the County of Los Angeles, a copy of which judgment is recorded in Book 361, page 77, of Deeds, Records of said County, included within the lines of Washington Boulevard, 90 feet wide, at Harriett Street.

The record discloses that Washington Boulevard is a public street extending from the westerly boundary of the

City of Los Angeles at the Pacific Ocean in the Venice area, and easterly through the entire breadth of the City and then for a distance of several miles east of the easterly boundary of the City. The grade separations are in the city in an area which constitutes one of the principal industrial districts. Washington Boulevard throughout most of its length has a paved surface of at least 60 feet in width, with a few exceptions where the pavement width varies from 40 to 60 feet. At the site of the existing grade separations, here under consideration, the roadway narrows down to 20 feet in width, and the vertical clearance is between 13 feet and 14 feet. The City's easement at this point is 90 feet.

The evidence in this case discloses that the rail lines in the area of Washington Boulevard were first turned over to the railroad's operating department on September 23, 1887, for the harbor line, and November 24, 1888, for the main line (Exhibit No. 64 R.H.).

The present grade separations were constructed in 1914 in accordance with an agreement between the City of Los Angeles and The Atchison, Topeka & Santa Fe Railway Company. The costs of the structures were borne one-half by the City and one-half by the railway. In 1926 an additional superstructure for another track was installed, and the cost of this addition was paid for in its entirety by the railway.

The applicant City of Los Angeles, during the course of the original hearings, presented three proposals: (1) to fill in the present separation and have the crossings at grade (2) to use the present grade separations for eastbound traffic and to build a new westbound roadway at grade and (3) to widen and increase the height of the existing underpasses. This third proposal is the one which is preferred by applicant. At the second hearing an engineer for the Bridge Division of the City of Los Angeles testified that this proposal, as shown on Exhibit No. 13 of the original hearing,[21] is still included in the City's plans.

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[21] The exhibits introduced at the original hearing were numbered from 1 to 20, inclusive, those at the rehearing from 21 R.H. to 63 R.H.

The original estimated cost of this proposal was as foliows:

Two span-deck girder railway bridges,		
One west of Harriet Street	$192,000	
One east of Harriett Street	204,000	$396,000
Structure wing walls and walls between structures		79,800
Storm drain, sewer		240,550
Slope rights		5,750
Total		$722,100

However, at the rehearing, the prior estimates of cost (Exhibits No. 14 and No. 15) were revised upwards as set out in Exhibits No. 21 R.H. and No. 22 R.H. The preferred proposal contemplates two bridges with deck girders of rolled, wide flange beam construction on two spans, providing two 43.5-foot openings with a median pier. Each opening would have a 33-foot roadway for three lanes of traffic and a 7-foot pedestrian walk.[22]

There was also advanced another proposal to have two 70-foot clear span, through-girder type of bridges, having a single roadway of 56 feet between curbs and two 7-foot walks for pedestrians.

The revised estimates of costs of these proposed structures follow:

Two clear span bridges:		
Bridge aA-1	$252,700	
Bridge aA-144	258,600	$511,300
Retaining and wing walls		57,845
		$569,145

[22] The details of this proposal are set out in Exhibits 9, 10, 11 and 13.

Two divided span bridges:		
Bridge aA-1	$234,000	
Bridge aA-144	246,200	$480,200
Retaining and wing walls		89,155
		$569,355

In addition to the foregoing costs, there will be additional costs for a storm drain sewer and also for slope rights.

In Decision No. 43374 we pointed out that the roadway on the Washington Boulevard bridge crossing the Los Angeles River is only 56 feet in width. Because there are no intervening streets between this bridge and the underpasses here in question and because of the short distance between the underpasses and the bridge, the width of the bridge roadway was held to be a limitation to the carrying capacity of the street.

The engineer for the Bridge Division of the City of Los Angeles presented testimony to the effect that it is entirely practical to widen this bridge. Exhibit No. 23 R. H. shows three possible ways of doing this and Exhibit No. 24 R. H. shows the estimates as to costs thereof. The plan preferred by the witness would provide a 66-foot roadway with two 5-foot 10-inch sidewalks and would cost $122,081. One of the other plans would provide a 60-foot roadway and two 5-foot 10-inch sidewalks at a cost of $100,959, while the remaining plan would provide a 60-foot roadway and one 5-foot 10-inch sidewalk at a cost of $17,580.

While the City of Los Angeles has no immediate plans for widening this bridge, it was the opinion of the witness that this should be done if the underpasses are widened as proposed.

The engineer of Street and Parkway Design for the City of Los Angeles testified that, in his opinion, the proposed underpass should make full use of the present 90-foot right of way and that to construct an underpass of 56 feet now would not be wise since it would be too difficult to widen in the future. Also, it was pointed out that the advisable procedure would be to widen the underpass first and then

widen the Los Angeles River bridge, the contention being made that the traffic needs justify such construction.

If the two divided span bridges are constructed, as recommended by the City, there would be two 33-foot roadways, permitting three 11-foot lanes in each direction. In addition, sidewalk facilities should be provided and the recommendation was that they be seven feet wide, one for each roadway.

Exhibit No. 25 shows the estimated total cost of this construction to be as follows:

Bridges	$480,200	
Walls	89,155	
Slopes	5,750	$575,105
Storm drain		158,660
Street work		72,810
Sewer work	10,350	
Traffic safety devices	1,840	12,190
		$812,765

Of the above amounts it was estimated that all of the cost of the bridges, walls and slopes, amounting to $575,105, and slightly more than one-third of the cost of the storm drain and street work, amounting to $125,910, or a total of $701,015, were costs necessitated by the presence of the railway. In other words, the cost to the City, if the railroad were not present, would be as follows:

Storm drain	$50,900	
Street work	48,660	
Sewer	10,350	
Traffic safety devices	1,840	$111,750

If this construction is carried out, the costs will have to be met without any help from state funds, according to this record.

Further testimony indicated that the bridge over the Los Angeles River was built in 1931 and it was then that Washington Boulevard became a through street. Prior to that time the existing underpasses were adequate, since they were used only by garbage trucks.

The principal traffic engineer of the City of Los Angeles referred to the prior record, Decision No. 43374, supra, and indicated that the present volume of traffic in the vicinity of the underpass exceeds by five per cent the volume as shown by said prior record. Likewise he reiterated that traffic which normally would use Washington Boulevard is now being diverted to other streets. Exhibit No. 26 R. H. shows the traffic volume in the area, as of Wednesday, December 1, 1948, and also as of Wednesday, December 13, 1950. This exhibit corroborates the above testimony. Exhibit No. 27 R. H., a speed and delay study of this area, also indicates the present underpass to be a bottleneck to traffic.

Exhibit No. 28 R. H. is a record of the accidents which occurred in the area and were reported to the Police Department during the period from February 2, 1948 to February 2, 1951. In this connection the general claim agent for the Santa Fe presented testimony that the railroad has had no costs for property damage or personal injury claims at this underpass. There has been but one claim, wherein an automobile hit the bridge but there was no liability on the part of the railroad.

A consulting engineer, testifying on behalf of the railroad, presented testimony and exhibits in relation to the problem. It was his opinion that widening the underpasses would increase the railroad's costs but would not increase its business. Further, any need for widening or increasing the height of the underpasses is occasioned by highway traffic and not by railroad operations. In the opinion of this witness, the financial soundness of a railroad could be undermined by placing on it too great a share of the cost of grade separations. In this instance, he pointed out, the widening of the underpasses would provide no benefit to the railroad, but actually would be a detriment because of the added expense to the railroad of maintaining a larger structure.

Exhibit No. 29 R. H. is a study compiled by this witness in support of the opinions hereinabove indicated, containing a rather detailed study of the relationship of highways to railroads and the resultant problems of their crossings both at separations and at grade. Among other items, this ex-

hibit contains data showing the grade separations constructed in California during 1948 and 1949, the cost, and the railroads' contributions, if any. Out of the thirty cases listed, five were financed under the Federal Aid Secondary Program and twenty-five were financed out of State funds. Twenty-seven were cases in which the railroad made no contribution, while in the remaining three, one Federal Aid and two State fund projects, the railroads' contribution ranged from 0.5 per cent to 15.4 per cent. All of these thirty constructions were new grade separations and not, as herein proposed, widening of existing overpasses. It was the opinion of this witness that a railroad derived more benefit from a new separation, where the disadvantages of a grade crossing are removed, than from the enlarging of existing structures where the railroad already has the advantage of an existing separation.

In Exhibit No. 31 R. H., this witness amplified this testimony by listing all of the grade separations constructed in California since 1920, showing the percentage of cost allocated to the railroad in each instance, and in Exhibit No. 30 R. H. he set out the total revenues of the various types of carriers in California. The revenues of highway carriers varied from 65.9 per cent of the total for all carriers in 1938, to 73.7 per cent in 1949, the low during this period occurring in 1940 at 65.3 per cent and the high in 1946 at 74.1 per cent.

This witness likewise presented a suggested plan for allocating costs of construction at grade crossings, which plan is set out in Exhibit No. 32 R. H. Further testimony of this witness related to population and motor vehicle registrations (Exhibit No. 33 R. H.), the highways in the area (Exhibit No. 34 R. H.), the general background of rail and highway development, and also some material on the present needs of the highway traffic in the area concerned.

Other witnesses for the railroad reiterated the contention that the widening of these underpasses would provide no benefit to the railroad. The annual reports of the Santa Fe to this Commission were placed in this record by stipulation. While they indicate the railroad to be receiving a rate of return of five per cent net in 1949, yet the witnesses strongly contended that to assess any part of the cost of

this grade separation to the railroad would place a financial burden on it without any benefit to the railroad being derived therefrom.

A representative of the Order of Railway Conductors testified that in the opinion of the group he represented the cost to the railroad should be limited to ten per cent.

The executive director of the League of California Cities filed a resolution, Exhibit No. 53 R. H., which resolution approved a formula of allocating costs whereby the municipality would stand that portion of the total costs of building the improvements if there were no railroad tracks involved and that the railroad would bear that portion of the cost occasioned by the presence of the railroad tracks.

Additional testimony produced by the railroad related to the average annual rate of return from 1930 to 1949 for all class one railroads in the United States and, individually, for The Atchison, Topeka & Santa Fe, Southern Pacific and Union Pacific railroads (Exhibit No. 35 R. H.). The same witness also testified, upon cross-examination, that the Santa Fe stock now sells for about $169 whereas ten years ago it was below $100.

The income of the railroad, as shown by its Federal income tax returns for the years 1930 to 1949, was received in evidence as Exhibit No. 53 R. H.

It was also pointed out that recently this company has started a motor carrier operation in California known as the Santa Fe Transportation Company.

Exhibits 37 and 38 R.H. show the accident record and claim costs for a five-year period at certain crossings of the Santa Fe Railroad with various highways. The railroad contended that the most hazardous crossings are in rural areas where there is high-speed auto travel and also high-speed train travel and that there are less accidents at city crossings.

A three-day traffic count of motor vehicles using Washington Boulevard was made in the vicinity of the underpasses here concerned during the days of November 27 and 29 and December 1, 1950 (Exhibits Nos. 39, 40, and 41 R.H.). It was stated by the railroad witness that the only congestion during this traffic count was on eastbound traffic which was blocked at Soto Street.

The bridge engineer for the railroad presented estimates as to the costs of various types of bridges which could be constructed to replace the existing structures (Exhibit No. 42 R.H.). He also called attention to the fact that the Union Pacific Railroad has a bridge across Washington Street east of Soto Street. This bridge provides for four lanes of traffic and could not be widened without great expense. Photographs of this bridge were presented as Exhibits Nos. 43 to 46 R.H. and an elevation drawing of this bridge was submitted as Exhibit No. 47 R.H. This same witness likewise presented the "as built" plans for the existing underpasses here in question, Exhibits 48 and 49 R.H. Other railroad witnesses testified that a four-lane bridge at the existing underpasses might sufficiently meet the needs of traffic.

The manager of the Metropolitan Traffic and Transit Department of the Los Angeles Chamber of Commerce stated he believed the traffic in the area to be sufficient to justify construction of a six-lane underpass.

Various documents of title were introduced into the record both by the Santa Fe and the City of Los Angeles. Exhibits Nos. 50 to 52 R.H. show the Santa Fe's deeds relating to the right of way for the rail tracks in the area, and Exhibits Nos. 54 to 58 R.H. are additional documents introduced by the City relative to the right of way.

Exhibit No. 59 R.H. is composed of copies of franchises from the City of Los Angeles issued to the Santa Fe Railroad covering various crossings and, in particular, one of the underpasses here under consideration.

An engineer of the City of Los Angeles presented testimony pertaining to several grade separations which have been built in recent years in the Los Angeles area. Exhibit No. 60 R.H. shows details of some of these underpasses. Exhibit No. 61 R.H. shows the "live loading" standards of railroad bridges as set out under the specifications of the American Railway Engineers' Association, as well as the recommendations made by that body. According to the witness, the present structures here under consideration were not in accordance with the recommended standards.

The City of Los Angeles further presented a land use map of Washington Boulevard between Alameda Street and Soto Street (Exhibit No. 62 R.H.) tending to show that Washington Boulevard in the vicinity of the underpasses here in question is not a freeway but is used as an access street to the adjacent properties.

After a careful consideration of all of the evidence adduced herein, and in the light of the evidence adduced in the original hearings, having the benefit of the briefs and oral arguments which have been presented, we conclude to affirm our prior findings to the effect that there is a need for widening and increasing the height of the existing underpasses.

We also find that the preferred plan of the City of Los Angeles, as set out in Exhibit No. 13, heretofore described, sets out the construction which would be most practicable and best meet the public safety, convenience and necessity in this matter.

Our question herein, therefore, is primarily one of cost. If the proposed underpasses are constructed, who shall bear the expense? The positions of the parties have not changed since the prior hearings. Throughout these proceedings the City of Los Angeles has contended that the railroad should pay that portion of the total cost which is attributable to the presence of the railroad tracks. Under this contention it is the City's position that it should pay only that cost of widening the street which it would pay if there were no railroad crossing, and all other costs, including the cost of the bridge and its supports, should be borne by the railroad.

It has been the position of the railroad throughout these proceedings that the costs should be allocated according to benefits received. It contends that the railroad will receive no benefits from the proposed structures since it now is operating in a satisfactory manner over the present structures, and the widening of the street will in no way change these operations. As a matter of fact, it is the railroad's position that the construction of new structures will actually be a detriment, since there will be increased costs in their maintenance. The railroad further contends

that the need for new structures has not arisen because of any railroad operations, but rather because of the increased motor vehicle and pedestrian traffic in the vicinity.

In the light of the particular facts in this record, we do not subscribe to either contention. Previously, in Decision No. 43374, we held that, due to the width of the existing bridge over the Los Angeles River, and giving consideration to the length of the proposed structure, as well as to the length of the existing structure, 40 per cent of the cost attributable to the presence of the railroad tracks should be allocated one-half to the railroad and one-half to the City.

In the light of the facts presented at the rehearing, particularly with reference to the possibilities of widening the existing bridge over the Los Angeles River, and also with reference to the costs of the various structures proposed, as hereinbefore set out, we find that the method of allocating costs, as set out in Decision No. 43374, should be discarded.

The authority of this Commission to allocate costs in this matter stems primarily from Section 1202 of the Public Utilities Code, from which we quote in part:

"The Commission has the exclusive power:

"(b) To alter, relocate, or abolish by physical closing any such crossing heretofore or hereafter established.

"(c) To require, where in its judgment it would be practicable, a separation of grades at any such crossing heretofore or hereafter established and to prescribe the terms upon which such separation shall be made and the proportions in which the expense of the construction, alteration, relocation, or abolition of such crossings or the separation of such grades shall be divided between the railroad or street railroad corporations affected or between such corporations and the State, county, city, or other political subdivision affected."

There is no statutory requirement that this Commission follow any particular theory of allocation of costs. Under

the theory advanced by the City of Los Angeles that the railroad should pay the additional costs of construction resulting from the presence of the tracks, the railroad's share would amount to about 86 per cent of the total costs. Under the theory advanced by the railroad that it should pay only according to the benefits it receives, and considering its contention that it receives no benefits, its contribution would be nothing.

The authority of this Commission to allocate costs, as designated in Section 1202 of the Public Utilities Code, supra, is an exercise of the police power on the part of the State of California through the medium of its agency, the Public Utilities Commission. We hold that the law is well established that under the exercise of the police power a state may regulate the crossings of railroads with its highways, and may require grade separations to be erected and maintained, apportioning the costs in the exercise of its sound discretion. (*Erie Railroad Company* v. *Board of Public Utility Commissioners*, 1920, 254 U. S. 394; 65 L. ed. 322; *Chicago, Milwaukee and Saint Paul Railway Company* v. *Minneapolis*, 1914, 232 U. S. 430; 58 L. ed. 671; *Missouri Pacific Railway Company* v. *Omaha*, 1914, 235 U. S. 121; 59 L. ed. 157; *Lehigh Valley Railroad Company* v. *Board of Public Utility Commissioners*, 1928, 278 U. S. 24; 73 L. ed. 161).

The railroad here contends that the modern development of the law in regard to apportionment of costs in grade separation cases has been toward the allocating of such costs according to the benefits received by the parties involved. In 1932, we are reminded, these same parties were before this Commission in a similar proceeding involving a proposed widening of the same two crossings. (Decision No. 25069, dated August 15, 1942, in Application No. 18063, 37 C.R.C. 784). The Commission's order authorized the widening, and held that the costs should be borne "25 per cent by The Atchison, Topeka & Santa Fe Railway Company and 75 per cent by applicant." The Commission then said, "In apportioning the costs of constructing these separations between applicant and the railroad company, due consideration should be given to the obligations of each party,

as well as to the benefits derived." However, this record discloses that material changes have taken place in conditions at the present time as compared to those in 1932. As we said in Decision 43774, supra, "The great increase in population and the tremendous increase in motor vehicle traffic present a new problem."

Likewise, the railroad relies rather strongly on the decision of the United States Supreme Court in *Nashville, Chattanooga and St. Louis Railway* v. *Walters*, 1934, 294 U. S. 405; 79 L. ed. 949. There an order of the State Commissioner of Highways requiring the railroad to construct and pay one-half the cost of an underpass at the intersection of the tracks and a proposed state highway was held to be arbitrary and unreasonable since the railroad received no benefits from the proposed construction. In that case the highway involved was not designed to meet local transportation needs, but was a state highway intended to be a link in the national transportation system, and the financing thereof was to come largely through Federal aid.

In the instant case, the proposed widening of Washington Boulevard is to meet local transportation needs, and the City's contribution thereto must come entirely from local funds.

In Decision No. 43374, supra, we said "the railroad has a continuing obligation to participate in the cost of such an improvement as is contemplated." While we hold that the allocation of costs herein is an exercise of the police power, and that we are not bound to follow the benefit theory, we observe that this proposed improvement is not without benefits to the railroad. Because of the grade separation it can operate longer trains without experiencing delays at this location and without the hazard of grade crossing accidents. The proposed structure would result in a new bridge to replace one that is 75 per cent depreciated, and the new bridge would conform to the recommended "live loading" standards or cooper ratings, whereas the present structures do not.

As previously pointed out herein, the estimated costs of the proposed structures which may be said to be attributable to the presence of the railroad tracks for two divided

span bridges is $569,355. The remaining costs are clearly attributable to the paving and widening of the street. We find that this amount of $569,355 is the amount of costs which should be allocated in this proceeding.

After a full consideration of all of the evidence, briefs and oral argument presented in this matter, we hereby find it to be in the public interest to authorize the widening and increasing of the height of the existing underpasses of Washington Boulevard and the Harbor Branch Line and the main line railroads of The Atchison, Topeka & Santa Fe Railway Company, in accordance with the preferred plan of the City of Los Angeles as previously described herein. We further find that The Atchison, Topeka & Santa Fe Railway Company shall bear fifty per cent (50%) of the said amount of $569,355, the costs to be allocated, hereinabove indicated, and the City of Los Angeles the remainder.

ORDER ON REHEARING

Application as above entitled having been filed, a hearing and rehearing having been held thereon, and the Commission being fully advised in the premises,

It is ordered that the City of Los Angeles be, and it hereby is, authorized to widen and increase the height of the existing underpasses of Washington Boulevard and the Harbor Branch Line and the main line railroads of The Atchison, Topeka & Santa Fe Railway Company in the manner and at the locations more particularly described in the foregoing opinion, and substantially in accordance with the plan introduced in evidence in this proceeding, subject to the following conditions:

1. Fifty per cent (50%) of the costs of the proposed structures attributable to the presence of the railroad tracks, as defined in the foregoing opinion, excluding the costs attributable to the paving and widening of the street, shall be borne by The Atchison, Topeka & Santa Fe Railway Company, and the remainder of the costs shall be borne by the City of Los Angeles.

2. In the event applicant elects to construct said undergrade crossings, the cost of maintaing those portions of the separations which, for the purpose of this

decision, shall be referred to as the superstructures, which shall be deemed to be everything above the bridge seats, shall be borne by The Atchison, Topeka & Santa Fe Railway Company. The remainder of the maintenance of said structures shall be borne by applicant.

3. Prior to the commencement of construction, applicant shall file with this Commission for approval a set of plans for the proposed alterations of the grade separation crossings, which plans shall have been approved by The Atchison, Topeka & Santa Fe Railway Company, or bear a statement as to why the said railway company refuses to approve such plans. In the event the said railway company refuses to approve such plans, this Commission may issue supplementary orders in this matter.

4. The crossing shall be constructed with clearances conforming to the provisions of General Order 26D of this Commission.

5. Within thirty (30) days thereafter, applicant shall notify this Commission, in writing, of the completion of the installation of said crossings and of its compliance with the conditions hereof.

6. The authorization herein granted shall lapse if not exercised within one (1) year after the date hereof unless further time is granted by subsequent order.

The effective date of this order shall be sixty (60) days after the date hereof.

Dated at San Francisco, California, this 24th day of June, 1952.

R. E. MITTELSTAEDT,
President.
JUSTUS F. CRAEMER,
HAROLD P. HUIS,
KENNETH POTTER,
PETER E. MITCHELL,
Commissioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1952.~~ 1953

No. ~~861~~ 22

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, A CORPORATION,

Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, AND CITY OF LOS ANGELES, A MUNICIPAL CORPORATION,

Appellees.

BRIEF IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM.

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THE SUPREME GILBERT PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 667

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, A CORPORATION,

Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, AND CITY OF LOS ANGELES, A MUNICIPAL CORPORATION,

Appellees.

BRIEF IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM.

Statements opposing jurisdiction and motions to dismiss or affirm have been filed by the appellees herein, the Public Utilities Commission of the State of California and the City of Los Angeles. This brief is submitted in opposition to these motions, as permitted by Rule 7(3) of the Rules of this Court. The matters referred to in appellees' statements opposing jurisdiction may appropriately be considered under three headings: (1) the basis of the Commission's order; (2) the attempted distinction of the *Nashville* case; and (3) the jurisdiction of this Court on appeal.

1. THE BASIS OF THE COMMISSION'S ORDER.

Appellant pointed out in its Statement as to Jurisdiction that this Court's most recent decision involving the question of the imposition of grade separation construction costs, *Nashville, C. & St. L. Ry.* v. *Walters*, 294 U. S. 405, stated the principle that under present day conditions assessments laid upon railroads for such improvements are constitutional "only if based on benefits received by them." (*Id.* at 430.) Appellant also pointed out that the Commission not only refused to follow that principle but took pains to assert in its opinion that "we are not bound to follow the benefit theory." Moreover, the Commission attempted to distinguish the *Nashville* case and specifically relied upon several earlier decisions of this Court which, having been decided prior to its recognition of the "transportation revolution," sanctioned the imposition of total grade separation costs upon the railroad. (See Appendix B to Statement as to Jurisdiction.)

In its Statement Opposing Jurisdiction, however, the Commission, without saying so openly, would have this Court infer, nevertheless, that it did give effective consideration to the benefits to the Santa Fe in allocating 50% of the total cost of construction to the railroad. The Commission says to this Court in the section designated "Statement of the Facts":

> "The Commission, in adherence to the entire record and in the light of particular facts presented during rehearing, did not subscribe to either of the foregoing contentions of said parties, but stated that '*In apportioning the costs of constructing these separations between applicant* (*City of Los Angeles*) *and the railroad company* (*Santa Fe*), *due consideration should be given to the obligations of each party, as well as to the benefits derived,*' explaining as follows: * * *."[1]

[1] Emphasis is supplied throughout this brief unless otherwise noted.

The Commission repeats this plain representation in support of its argument that "no substantial Federal question is presented," as follows:

> "The Commission, in apportioning the costs of constructing the instant grade separation changes between the City and Santa Fe, gave due consideration to the obligations of each as well as to the benefits derived."

These two statements can only be explained as an effort by counsel representing the Commission to shield from judicial review its flat rejection of the benefit principle in favor of an arbitrary 50% assessment, and to make it appear instead that the expense of the structure was in fact allocated on the basis of "the benefits derived." What counsel neglect to tell the Court is that the sentence italicized above appears in the Commission's opinion on rehearing in this case *only as a quotation from its 1932 decision*, which had been relied upon by the Santa Fe as an instance of the Commission's recognition of the benefit principle. The Commission quoted its prior recognition of that principle only to reject it as no longer applicable.[2] In short, without identifying the quotation, counsel for

[2] In order that the Court may see the sentence quoted by the Commission in its context in the Commission's opinion, the paragraph in which it appears is reproduced as follows:

> "The railroad here contends that the modern development of the law in regard to apportionment of costs in grade separation cases has been toward the allocating of such costs according to the benefits received by the parties involved. In 1932, we are reminded, these same parties were before this Commission in a similar proceeding involving a proposed widening of the same two crossings (Decision No. 25069, dated August 15, 1932, in Application No. 18063, 37 C. R. C. 784). The Commission's order authorized the widening, and held that the costs should be borne '25 per cent by The Atchison, Topeka & Santa Fe Railway Company and 75 per cent by applicant.' The Commission then said, '*In apportioning the costs of constructing these separations between applicant and the railroad company, due consideration should be given to the obligations of each party, as well as to the benefits derived.* However, this record discloses that material changes

the Commission have indicated to this Court that its 1932 statement represents the basis of its present order, whereas in fact that basis was specifically rejected.

So that there may be no possible doubt about the real basis of the Commission's order, this Court may take notice of the fact that since its decision in this case the Commission has again assessed exactly 50% of the cost of a new grade separation against the railroad involved (the Southern Pacific Company). The significance of this subsequent decision lies in the fact that the Commission treated its action in the instant (Santa Fe) case as establishing a *rule of law* that benefits to the railroad need not be considered in allocating grade separation costs. The Commission there said:

> "While the railroad contended that the costs should be assessed according to the so-called 'benefits' theory, we affirm our holding in Decision No. 47344, dated June 24, 1952, on Application No. 29396 [the instant case], wherein it was held that the authority of this Commission to allocate costs stems primarily from Section 1202 of the Public Utilities Code and is an exercise of the police power on the part of the State of California through the medium of its agency, the Public Utilities Commission. *Therefore, we are not bound to follow the so-called 'benefits' theory,* * * *.*" *City of Glendale, Los Feliz Underpass*, 51 Cal. P. U. C. 788, 795-6.

The Commission itself has thus interpreted its decision in the instant case as resting not upon any appraisal of benefits to the railroad but upon its asserted authority, under the police power, to allocate costs as it chooses with-

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have taken place in conditions at the present time as compared to those in 1932. As we said in Decision 43774, *supra*, 'The great increase in population and the tremendous increase in motor vehicle traffic present a new problem.'" (Appendix B to Statement as to Jurisdiction.)

out constitutional limitation. A reading of the Commission's opinion will leave the Court no doubt of that fact.

The twisting and turning which counsel now finds to be expedient in stating the Commission's position as to the application of the benefit principle is highlighted by this language in its Statement in Opposition:

> "The Commission, in apportioning the cost of constructing the instant grade separation changes as between the City and the Santa Fe, [1] gave due consideration * * * to the benefits derived. * * * there is [2] no logical or legal basis for the contention that the costs of the instant Washington Boulevard grade separation improvement be borne by the parties respectively in accordance with the benefits to be derived by them [3] nor are any such benefits mathematically calculable. By the great weight of judicial decision above cited, [4] the element of direct benefit is absolutely immaterial. As stated by the Commission [5] it is one of the factors for consideration but [6] not necessarily the controlling factor."

The Commission thus argues here that it "gave due consideration * * * to the benefits derived"; that "there is no logical or legal basis" for the benefit theory; that such benefits are not "mathematically calculable"; that they are "absolutely immaterial," and that the Commission has recognized benefits received to be a factor for consideration but not necessarily the controlling factor. In stating its reasons for taking the action which is the subject of this appeal, the Commission disdained such circumlocution by forthrightly declaring that since it was exercising police power it was not bound to follow the benefit theory. But it has been something less than candid in its representations to the Court.

2. THE ATTEMPTED DISTINCTION OF THE NASHVILLE CASE.

Both appellees seek to characterize this Court's *Nashville* decision as "a single unique and distinguishable case," to be limited in its application to grade separations constructed in rural areas and in connection with intercity highways financed with federal-aid funds. Since the grade separations here involved lie within the limits of Los Angeles, and no federal funds are to be used, the constitutional principles stated in Mr. Justice Brandeis' opinion for the Court are said to be irrelevant.

We think the process of interpreting and applying Supreme Court decisions is not so shallow and unrewarding. Of course the Court addressed itself to the facts then before it, and of course this is a different grade separation. The important question—the question to which appellees fail to address themselves—is what circumstances present in the *Nashville* case led this Court to depart from a line of decisions which had sanctioned the imposition of total costs upon the railroads and to adopt a new approach to the problem by relating the allocation of costs to benefits received.

Appellant believes that this question can be resolved only after careful study of the problem upon full briefs by the parties. As a suggestion of the direction of the investigation, however, the Court should consider this statement by Mr. Justice Brandeis, with which he began his consideration of the principal issues presented in the *Nashville* case:

> "* * * The charge of arbitrariness is based primarily upon the revolutionary changes incident to transportation wrought in recent years by the widespread introduction of motor vehicles; the assumption by the Federal Government of the functions of road builder; the resulting depletion of rail revenues; the change in the character, the construction and the use

of highways; the change in the occasion for elimination of grade crossings, in the purpose of such elimination, and in the chief beneficiaries thereof; and the change in the relative responsibility of the railroads and vehicles moving on the highways as elements of danger and causes of accidents." 294 U. S. at 415.

Each of these "revolutionary changes" has been progressive in the years since that decision. California's network of multi-lane superhighways, of which Washington Boulevard is an important link, connects with, supplements and feeds the constantly expanding system of federal and state highways and thus has had an accumulative effect upon the railroads, identical in character with that of the federal highway program of the 1930s. The factors stated by the Court are precisely those on which appellant made its record below and now bases this appeal. There is much greater reason now than in 1935 to hold that an order allocating costs must not be arbitrary, because the considerations enumerated above have multiplied in force and impact.

To indicate briefly how the underpasses to be built on Washington Boulevard will serve the truck and commercial traffic with which the railroads must compete, just as in the case of the underpass involved in the *Nashville* case, it may be pointed out that the City's own traffic engineer testified that Washington Boulevard is a "primary" or major highway and that the widening of the instant underpass is designed to permit use of Washington Boulevard as a feeder for such new cross-country super highways, as the Santa Ana Freeway. Even at the present time, Washington Boulevard is a main arterial highway crossing Los Angeles in a east-west direction. On the west, it connects with U. S. Highway 101 and serves the Los Angeles harbor area; on the east, it connects with

state and federal highways carrying traffic to the north, east and south.

The intersection of Washington Boulevard with Alameda Street, just west of the subject underpass, was referred to by a witness for the City as the "center of gravity" for truck traffic serving the Los Angeles harbor and industrial area. From that focal point, the City's witness stated that truck traffic moves to the "four winds and to the hinterland." At present, about 2,000 trucks and 3,000 cars use the Washington Boulevard underpass daily, and the purpose of the proposed new underpass is solely to facilitate and increase the use of Washington Boulevard by trucks, buses and other motor vehicles now using other highways, including Olympic Boulevard, State Route 26, to the north.

The City fails to mention that an important feature of the proposed grade separation is an increase in the height or clearance of the present underpass. The City's traffic expert testified that the need for higher vertical clearance arises *entirely* because of truck traffic. That witness also testified that the greater percentage of large trucks now using Washington Boulevard are engaged in through traffic between San Francisco, Portland and other points and the Los Angeles industrial area and harbor.[4] Many other large trucks now avoid the Washington Boulevard underpass but would use the proposed underpass. In addition to this increase in the cost of the project to allow greater vertical clearance for large trucks, further increases in cost result from the especially wide lanes required to facilitate the unusually large number of trucks and buses for whose use the proposed underpass is designed. A basic purpose of the improvement is to speed this competitive traffic and so reduce the cost of handling.

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[4]As pointed out in appellant's Statement as to Jurisdiction, in 1949 the railroads handled only 20.9% of California intrastate freight business, the trucks 73.7%.

Thus, the difference in facts asserted by appellant indicates no more than that the grade separation in the *Nashville* case was designed to benefit the railroad's competitors in open country, whereas the Washington Boulevard project is designed to benefit the movement of the same type of traffic in and out of its terminal, in this instance the City of Los Angeles. The structure will be an important improvement in the terminal facilities of appellant's motor competitors, just as the separation in the *Nashville* case constituted an improvement in their main line facilities.[4]

The Commission presumably advances as further criticism of the *Nashville* case the observation: "nor are any such benefits mathematically calculable." The exercise of the reasoned judgment as to "benefits received" which that decision requires is not dependent on the use of any mathematical formulae, as the Commission well knows. As to the practical application of the *Nashville* rule, it is sufficient to note that the Commission itself applied the benefits principle without difficulty for 16 years, and that the Stanford Research Institute report referred to in appellant's Statement as to Jurisdiction commends its use.

2. THE JURISDICTION OF THIS COURT ON APPEAL.

The City of Los Angeles argues at some length that an appeal was not properly taken to this Court because a state "statute" is not involved. The argument is made that, whereas the portion of the Commission's order authorizing construction of the grade separation is legislative

[4] There is no question in this case as to appellant's "right to relitigate factual questions" (Commission's Statement in Opposition). The facts here discussed by appellant were placed in evidence by the City as well as appellant and stand uncontroverted in this record. The only issue in this case is the Commission's express refusal to apply the benefit principle to the uncontroverted facts, as required by the *Nashville* case.

in nature and is thus a "statute" within the meaning of Title 28 U. S. C. Section 1257(2), the portion of the order allocating costs is judicial in character and is not a "statute" as that term is used in this connection. The City contends that, since the Santa Fe contests only the erroneous allocation of costs, it cannot properly appeal from the judgment affirming the Commission's order. The contention borders on the frivolous.

In *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 226, this Court, through Mr. Justice Holmes, stated the basic distinction between legislative and judicial acts as follows:

> "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subjects of its power."

The City concedes that that part of the Commission's order authorizing construction of the grade separation is legislative in nature but argues that, chameleon like, the Commission changes color in the middle of its determination and becomes a judicial body enforcing established liabilities.

We submit that such a contention does violence to the basic distinction referred to in the *Prentis* case. It should be emphasized that Mr. Justice Holmes identified the judicial function with the enforcement of liabilities "under laws supposed already to exist." The City's argument loses all force once it is conceded that the Commission's order authorizing this particular grade separation was legislative in character.[8] The single Commission order

[8] *Ross* v. *Oregon*, 227 U. S. 150 (1913), the only decision of this Court cited by the City on this point, is inapposite. The question there considered was whether a decision by a state court in a criminal case was an *ex post facto* law where the court had con-

appealed from here reflects one legislative process—the establishment of a new rule relating to the grade separations in question, necessarily including a direction as to how the expenses incident thereto shall be borne.

That, certainly, is the Commission's view. In its decision on rehearing in this case (Appendix B to Statement as to Jurisdiction), the Commission said flatly:

> "The authority of this Commission to allocate costs, as designated in Section 1202 of the Public Utilities Code, *supra*, is an exercise of the police power on the part of the State of California through the medium of its agency, the Public Utilities Commission. We hold that the law is well established that under the exercise of the police power a state may regulate the crossings of railroads with its highways, and may require grade separations to be erected and maintained, apportioning the costs in the exercise of its sound discretion."

And in its Statement Opposing Jurisdiction filed in this Court the Commission says:

> "We steadfastly contend that the orders of the Commission constitute a valid and reasonable exercise *of the police power* without impairment of any obligation or right whatsoever of Santa Fe * * *."

It is not surprising, therefore, that the Commission does not join the City of Los Angeles in contending that this appeal involves solely the exercise of judicial power.

Finally, this Court has always considered state commission orders of this kind as involving legislative acts. In *Grand Trunk Ry.* v. *Indiana R. R. Comm.*, 221 U. S. 400, a state commission order allocating costs of grade crossing protective devices was involved. There, as here, there

---

strued a state constitutional amendment as not repealing the statute upon which the prosecution was based.

was no claim that the Commission had not properly author
ized the construction but only that the portion of the orde
allocating costs was unconstitutional as abrogating a con
tract between two railroads involved. This Court said:

> "Observing first, that the order is a legislative act
> by an instrumentality of the State exercising dele
> gated authority (*Prentis* v. *Atlantic Coast Line Co.*,
> 211 U. S. 210, 226), is of the same force as if made by
> the legislature, and so is a law of the State within the
> meaning of the contract clause of the Constitution
> [citations], we come to consider whether it does im
> pair the obligation of the contract." 221 U. S. at 403

It is thus plain that this Court has not recognized the the
ory relied upon by the City.*

CONCLUSION.

Of the three asserted grounds for dismissing this ap
peal or affirming the judgment of the state court, appel
lees are together on only one—that somehow the *Nashville*
case is to be distinguished from the situation here pre
sented, which is to be governed by decisions antedating
that case and permitting the assessment of the full cost o
grade separation construction upon the railroad. We be
lieve that a reading of this Court's opinion will demon
strate that Mr. Justice Brandeis' detailed exposition of th
"revolution" in the relation between rail and highway
traffic was of import and significance for the future, no
the irrelevant dictum of "a single unique case," as appel
lees maintain.

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*If the present appeal were improvidently taken, 28 U. S. C
Section 2103 provides that this Court shall consider the appea
papers as a petition for certiorari.

It is respectfully submitted that probable jurisdiction should be noted.

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IN THE

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OCTOBER TERM, 1953.

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THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
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Agricultural and Mechanical College of Texas, Bulletin 116, Highway Loads and their Effects on Highways 48

Beggs, The Railway-Highway Grade Crossing Problem 37, 42, 55, 61-62

Bureau of Public Roads, Highway Statistics, Summary to 1945 .....31, 34

Bureau of Public Roads, Highway Statistics, 1950.... 33

Bureau of Public Roads, Highway Statistics, 1951.... 34

California Assembly Interim Fact-Finding Committee on Tideland Reclamation, Etc., Third Report on the Railroad-Highway Crossing Problem in California 54, 55

California Legislature, Joint Fact-Finding Committee on Highways, California Highways 21, 22, 75, 76

Davis, The Railroad Grade Crossing Problem....20, 21, 54

Division of Highways, California Department of Public Works, Third Annual Report..... 44

Federal Co-ordinator of Transportation, Public Aids to Transportation 60-61

Institute of Traffic Engineers, Traffic Engineering Handbook 49

Interstate Commerce Commission, 52nd Annual Report 19

Interstate Commerce Commission, Bureau of Transport and Statistics, Monthly Comment, August 12, 1953 46

Interstate Commerce Commission, Statistics of Railways in the United States 35, 36

Joint Committee of Railroads and Highway Users, Regulation and Taxation of Highway Transportation 59-60

Labatut and Lane, Highways in Our National Life.... 44

Los Angeles Grade Crossing Committee, Report of Sub-Committee dated January 5, 1951.....22, 76, 77

Massachusetts Legislature, Report of an Investigation into the Subject of the Gradual Abolition of Crossings of Highways by Railroads at Grade.... 51

Minnesota Legislative Research Commission, Grade Crossing Accidents in Minnesota 54

National Association of Railroad and Utilities Commissioners, Proceedings of 45th Annual Convention 65

National Conference on Street and Highway Safety, Guides to Traffic Safety 60

National Highway Users Conference, Inc., The Highway Transportation Story 36

National Safety Congress (37th), Report of Highway-Railroad Crossing Committee 56, 57

Public Roads Administration, General Administrative Memorandum No. 325..... 63

Public Roads Administration, Highway Practice in the United States of America..... 48

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APPEALS FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA.

JOINT BRIEF FOR APPELLANTS.

FOREWORD.

The cases covered by this brief present identical legal questions, arising out of very similar factual situations.

The cases have followed practically the same course before the California Public Utilities Commission and in the Supreme Court of California. The decisions of the Commission challenged by these appeals were rendered only six days apart (June 24 and 30, 1952). In its later (*Southern Pacific*) decision the Commission referred to and adopted the legal conclusions which it had stated in the earlier (*Santa Fe*) case. The principal appellee in both cases is the Commission, and the City of Los Angeles is a "real party in interest" in both cases.

The cases reached this Court in close succession, and by orders of May 18, 1953, were assigned for argument, one immediately following the other. In order to avoid duplication, the appellants, after consulting the Clerk of this Court, file this joint brief.

OPINIONS BELOW.

The Supreme Court of California entered final orders in each of these cases, but wrote no opinions.[1] The initial opinion and order rendered by the Public Utilities Commission of California in No. 22 is reported at 49 Cal. P. U. C. Reports 147 and is reproduced at AR. 136.[2] Its opinion and order on rehearing is reported at 51 Cal. P. U. C. Reports 771, and is reproduced at AR. 115.

The original opinion and order rendered by the Com-

[1] By said orders the Court denied appellants' separate Petitions for statutory Writs of Review to determine the validity of the Commission's decisions here challenged. Such order is a judgment upon the merits. *Napa Valley Electric Co.* v. *Railroad Commission*, 251 U. S. 366, 372-373 (1920).

[2] References to the printed record in No. 22, the *Santa Fe* case, are indicated "(AR. ....)," and references to the printed record in No. 43, the *Southern Pacific* case, by "(SR. ....)." In the latter record, the appendix to the Petition for Writ of Review in the state court is separately paged and numbered; references to pages in that appendix are therefore shown as: "SR. App. ....." Emphasis is supplied throughout this brief unless otherwise indicated.

mission in No. 43 is reported at 51 Cal. P. U. C. Reports 788, and is reproduced at SR. App. 19. The Commission's opinion and order denying rehearing is noted (but not reported) at 52 Cal. P. U. C. Reports 15, and is reproduced at SR. App. 84.

JURISDICTION.

The final judgment of the Supreme Court of California in No. 22 was entered on December 11, 1952. On February 25, 1953, a petition for appeal from said judgment was presented to the Chief Justice of that Court and on February 26, 1953, the Chief Justice signed an order allowing the appeal. The appeal was docketed on March 20, 1953.

The final judgment of the Supreme Court of California in No. 43 was entered on March 9, 1953. On March 23, 1953, a petition for appeal was presented to the Chief Justice of that Court, and on March 26, 1953, the Chief Justice signed an order allowing the appeal. This appeal was docketed on April 23, 1953.

Statements opposing jurisdiction, with motions to dismiss or affirm, were filed by the Commission in each case. A like statement and motion was filed by the City of Los Angeles, as appellee, in No. 22, and by the Cities of Los Angeles and Glendale, as "real parties in interest," in No. 43. Briefs in opposition to these motions were duly filed in each case by the appellants.

By orders entered on May 18, 1953, this Court postponed consideration of the question of the jurisdiction of the Court in these cases, pending the hearing of the cases on the merits (AR. 259; SR. 294).

The jurisdiction of this Court to review these judgments by appeal is conferred by Title 28, United States Code, Section 1257(2).

QUESTIONS PRESENTED.

In No. 22, the Public Utilities Commission of California, by its order on rehearing, assessed against appellant therein, an interstate railroad, one-half of the cost (estimated at $569,[illegible]) of reconstructing and enlarging, from two to six traffic lanes, the existing grade separations at the point where Washington Boulevard intersects appellant's railroad line in the City of Los Angeles.

In No. 43, the Commission, by its order, assessed against appellant therein, an interstate railroad, one-half of the cost (estimated at $1,493,200) of constructing a six-lane grade separation, in place of the present grade crossing, at the point where Los Feliz Boulevard in (and adjacent to the common boundary of) the cities of Los Angeles and Glendale, California, crosses said appellant's railroad line.

Pursuant to provisions of California law, each appellant petitioned the Supreme Court of California to review the assessment against it, and upon such review to hold that the order thus challenged was invalid, because in violation of the specific provisions of the Federal Constitution hereinafter cited. That Court denied each petition by summary order without opinion, two judges dissenting.

The questions presented are:

1. Whether the orders of the Commission requiring appellants to pay assessments bearing no relation to and greatly exceeding the benefits to be derived by appellants from the proposed projects will, if enforced, operate to take appellants' property for public use without just compensation, in violation of the Fourteenth Amendment.

2. Whether the orders of the Commission requiring each appellant to pay an arbitrary assessment of 50 per cent of the cost of the proposed grade separation construction with which that appellant is concerned, regard-

less of the existence or amount of benefits to be derived therefrom by that appellant, will if enforced operate to deprive appellants of their property without due process of law, and to deny to them the equal protection of the laws, all in violation of the Fourteenth Amendment.

3. Whether the orders of the Commission, requiring appellants to pay amounts not based upon, and greatly in excess of, the benefits which will accrue to them respectively from the proposed structures, will, if enforced, operate to impose undue and unreasonable burdens on interstate commerce, in violation of the Commerce Clause (Article I, Section 8, Par. 3) of the Constitution of the United States, and the National Transportation Policy declared by Congress, 54 Stat. 899, 49 U. S. C. preceding § 1.

4. Whether the orders of the Commission authorizing and directing the construction of said grade separation structures, and in each case assessing 50 per cent of the cost of such construction against the appellant concerned therewith, are "statutes of a state," within the meaning of Section 1257 (2) of Title 28, United States Code, and thus whether these causes are properly before this Court on appeal rather than on writ of certiorari.

STATUTES INVOLVED.

The statutes involved, as that term is used in Title 28, United States Code, Section 1257(2), are the final orders of the Public Utilities Commission of California, purportedly made under authority of Section 1202(c) of the Public Utilities Code of California (AR. 115; SR. App. 19), and entered in the causes now on appeal in this Court.

STATEMENT.

No. 22.

Appellant, in No. 22, the Atchison, Topeka and Santa Fe Railway Company (hereinafter referred to as the Santa Fe), is a common carrier by railroad, operating trains in interstate commerce in the western half of the United States. For many years (since 1887-1888), the Santa Fe and its predecessors have maintained the particular railroad lines involved in this case, located within the present boundaries of the City of Los Angeles, upon private rights-of-way acquired for the purpose. Two sets of tracks cross a street now known as Washington Boulevard upon two railroad viaducts constructed in 1914. These structures each provide street openings 20 feet wide, with vertical clearances of less than 14 feet (AR. 10). In 1926 the business of the railroad required the laying of an additional track; and the Santa Fe, at its own expense, made the necessary changes in the superstructure over the street (AR. 10). In 1931 the use of Washington Boulevard was greatly increased because of the City's construction of a bridge across the Los Angeles River, just east of the underpasses (AR. 35). This new bridge opened Washington Boulevard as an arterial highway, extending from the Pacific Ocean easterly to points several miles beyond the eastern limits of Los Angeles (AR. 35). An immediate increase in the volume of vehicular traffic resulted in an application by the City for authority to enlarge the separations, and the Commission in 1932 authorized the construction of two 56-foot structures to replace the existing 20-foot underpasses. Largely on the basis of benefits to be received from the new construction, the Commission allocated 75% of the cost to the City and 25% to the Santa Fe. The City failed to take action within the time limit provided by the order, which therefore lapsed (AR. 141).

By 1948, the volume of traffic on Washington Boulevard had grown tremendously. The highway, now increased generally to 60 feet in width, and connected up with important cross-country highways then existing and in the process of construction, had become a principal artery of truck and commercial traffic (AR. 17-18). The "center of gravity" for truck traffic for the entire city is at a point on this highway less than a mile west of the separations, which is the focal point of commercial highway traffic "to the four winds and from the hinterland" (AR. 18).

A traffic count taken in 1950 disclosed that during a six-hour test period in excess of 12,000 vehicles, or more than 2,000 per hour, of which more than 25% were trucks, used the Washington Boulevard underpasses (AR. 18). Construction of the new, wider separation structures is expected to result in considerable additional traffic that now uses parallel routes (AR. 17, 19). In short, the striking changes in the volume and character of the highway traffic in this area since 1914 are such that it has become necessary to expedite the flow of that traffic by the construction of six-lane underpasses, although the present structures are still perfectly adequate for present and future railroad requirements (AR. 16).

Accordingly, in 1948 the City applied to the Commission for authority to construct the two new separations here involved, each to be 90 feet wide and with added (15-feet) vertical clearance, made necessary by the greater sizes of the latest truck designs (AR. 11). After receiving evidence and considering briefs, the Commission made its initial order authorizing the construction applied for, finding that "the widening of the underpass is now necessitated by the increase in vehicular and pedestrian traffic" (AR. 141). By its order the Commission directed that the City should bear all expenses involved in the building of the new

roadway and separations, except for the sum of $95,160, which was allocated to the Santa Fe (AR. 145).

Both the City, and subsequently the Santa Fe, filed petitions for rehearing of the Commission's order, principally challenging the allocation of cost. These petitions were granted, and further hearing was held. Again there was no dispute as to the fact that, as the Commission had previously found, the new construction was necessitated wholly "by the increase in vehicular and pedestrian traffic." The Santa Fe therefore reiterated its contention that, under principles recognized by the Commission itself for many years and enunciated by this Court in a very similar case, the portion of the cost assessed against the railroad should not exceed a fair evaluation of the benefits it will receive from construction of the new separation.[3]

In its decision on rehearing (AR. 115) the Commission ordered the Santa Fe to pay a flat 50% of the cost of the new construction. While stating in passing (AR. 130): "we observe that this proposed improvement is not without benefits to the railroad," the Commission declared: "*We hold that the allocation of costs herein is an exercise of the police power, and that we are not bound to follow the benefit theory.*" Having thus concluded that, under the police power, its authority to impose upon the railroad the full burden of the cost of the new separations is unbridled by any countervailing constitutional limitations, the Commission did not attempt or pretend to justify on any factual or logical basis the assessment of costs against the Santa Fe. In brief, the 50% cost allocation to the Santa Fe is acknowledged to be wholly arbitrary in that it does not purport to represent a reasoned judgment based upon "benefits received" or,

[3] *Nashville, C. & St. L. Ry.* v. *Walters*, 294 U. S. 405, 430 (1935): "• • • so called assessments for public improvements laid upon particular property owners are ordinarily constitutional only if based on benefits received by them."

indeed, to reflect any ascertainable standard of allocation of costs. The record before the Commission proved, and the Commission has never denied, that the benefits to the Santa Fe will be far less than the assessment against it. However, the Commission, on the ground that it was exercising police power, refused to measure the respective benefits to the railroad and to the City, or to allocate the costs of this public improvement on that basis (AR. 130).

Upon denial by the Commission of appellant's petition for further rehearing, the Santa Fe filed a Petition for Writ of Review in the California Supreme Court, supported by a detailed Memorandum of Points and Authorities. That court, two judges dissenting, denied the Petition, thus refusing to bring up the record (AR. 253), after which an appeal was taken to this Court within the time fixed by statute.

No. 43.

Appellant in No. 43, the Southern Pacific Company, is also an interstate common carrier by railroad. The lines which comprise its system are located in nine of the western and southwestern states.

For over seventy-five years appellant has maintained and operated a railroad line between Los Angeles and San Francisco. At a point adjacent to the present boundary between the cities of Los Angeles and Glendale this line, which is built on a private right-of-way acquired in 1873, crosses a street now known as Los Feliz Road (Boulevard) (SR. App. 104). This street was first opened across the railroad some time between 1887 and 1912 (SR. App. 31, 104), and at all times the crossing over the railroad tracks has been at grade (SR. App. 2, 20). For many years continuous 24-hour protection against collisions between vehicles on the roadway and trains or engines on the rail-

road has been afforded by crossing gates operated by railroad employees (SR. App. 87).

For at least 30 years, Los Feliz has been an important highway artery, since it provides a direct, through route between heavily populated areas of Los Angeles County (SR. App. 104-112), and connects directly with major intra- and interstate highways, notably State Highway 4, and U. S. Highways 99 and 66 (SR. App. 106-107). As early as 1925 the Commission considered the necessity for a grade separation structure at the Southern Pacific-Los Feliz crossing, and at that time a traffic count disclosed that 14,205 vehicles passed over the crossing during a typical 16-hour period.[4]

Since 1925 the volume of traffic on Los Feliz has risen to a daily average of 27,000 vehicles at the site of the crossing (SR. App. 104-105, 109), an increase of nearly 100%. The roadway has now been widened to six lanes and improved in many other particulars. This further increase in highway traffic moved the City of Glendale, in 1951, to make another application to the Commission for an order authorizing construction of a separation and apportioning the cost (SR. App. 1). The formal application asserted that the separation was required for the following purposes:

> "(a) To permit Los Feliz to carry its normal traffic without the delays caused by the passage of trains;
> "(b) To prevent traffic congestion and the blocking of traffic on San Fernando Road, a State highway; and
> "(c) To permit the public to receive and enjoy the full benefit of its present large investment in the traffic facilities afforded by the present improvements on Los Feliz" (SR. App. 4-5).

After receiving evidence, and considering briefs filed by

[4] See Commission decision No. 17330, 28 Cal. R. C. Rep. 516, 520 (1925). The Commission authorized construction of a separation estimated to cost $421,790, but the authority granted was never exercised.

certain of the parties in interest, the Commission rendered its decision approving construction of a separation estimated to cost $1,493,200, and allocating 50% of that cost to the Southern Pacific, 25% to the County of Los Angeles, and 12½% each to the cities of Los Angeles and Glendale. The evidence showed (SR. App. 28, 87), and in its opinion the Commission in effect found, that the economic justification for the proposed separation—i.e., the economic benefits which it would provide—lay principally in the elimination of delays now experienced by motor traffic at the crossing, which were calculated to cost $57,362 per year, and to a lesser extent in the net saving of crossing protection and claim expense to the railroad, amounting to $5,917 per year. The two amounts together ($63,279) were capitalized at 3%, 4% and 5% per year to produce capital sums closely approximating the estimated cost of the structure (SR. App. 28).

The railroad had contended that the Commission, in determining the allocation of costs, should be guided by the "benefit principle," set forth in this Court's opinion in *Nashville, C. & St. L. Ry.* v. *Walters*, 294 U. S. 405 (1935), and applied by the Commission itself for many years. The Commission held, however (SR. App. 32) that since its authority to allocate costs stems from the state statute and "is an exercise of *the police power* on the part of the State", "*therefore*, we are *not bound* to follow the so-called 'benefits' theory," relying upon its own prior assertion of such a principle six days earlier in No. 22, the *Santa Fe* case (AR. 115-132). Accordingly, as in No. 22, it made no attempt to justify the 50 per cent allocation to the appellant railroad, by reference to either the evidence as to relative benefits or any other ascertainable standard.

Upon denial by the Commission of its petition for rehearing (SR. App. 84), appellant filed a Petition for Writ of Review in the Supreme Court of California (SR. 1).

On March 9, 1953, that Court entered its order (SR. 287), two justices dissenting, denying the petition and thereby refusing to bring up the record, following which an appeal was duly taken to this Court.

SPECIFICATION OF ERRORS.

The Supreme Court of California erred:

1. In failing to hold that the orders of the Public Utilities Commission requiring appellants to pay assessments bearing no relation to and greatly exceeding the benefits to be derived by appellants from the respective grade separation project with which each is concerned will, if enforced, operate to take their properties for public use without just compensation, in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

2. In failing to hold that the orders of the Commission requiring each appellant to pay an arbitrary assessment of fifty per cent (50%) of the cost of the grade separation construction with which it is concerned, regardless of the benefits, or any benefits to be derived therefrom by said appellant, will, if enforced, operate to deprive appellants of their property without due process of law, and to deny to them the equal protection of the laws, all in violation of the Fourteenth Amendment.

3. In failing to hold that the orders of the Commission requiring appellants to pay amounts not based upon and greatly in excess of the benefits which will accrue to them from the proposed construction will, if enforced, operate to impose undue and unreasonable burdens upon interstate commerce, in violation of the Commerce Clause (Article I, Section 8, Par. 3) of the Constitution of the United States, and the National Transportation Policy declared by Congress, 54 Stat. 899 (1940).

4. In failing to grant the appellants' Petitions for Writs of Review addressed to said court, and refusing to call up and consider the entire record before the Commission, thereby affirming and approving the Commission's action as an exercise of the police power and hence *per se* a lawful taking of railroad property regardless of the facts as to benefits received.

SUMMARY OF ARGUMENT.

A. The problem as to who should pay the cost of railroad-highway grade separation structures is not a new one. During the horse and buggy era, when a few such separations were built as safety measures, imposition of the full cost of construction upon the railroads involved was upheld by this Court on the theory that the railroads were responsible for the danger to intermittent highway traffic at grade crossings and could be required, under a state's police power, to eliminate that danger. See *e.g.*, *Missouri Pacific Ry. Co. v. Omaha*, 235 U. S. 121 (1914).

B. In 1935, however, this Court decided *Nashville, C. & St. L. R. Co. v. Walters*, 294 U. S. 405, involving the constitutionality of an arbitrary assessment by the State of Tennessee of 50% of the cost of a new rail-highway grade separation structure against the railroad. Although urged by the State to reapply the old rule, this Court, in an opinion by Mr. Justice Brandeis, refused to do so, noting that "A statute valid when enacted may become invalid by change in the conditions to which it is applied." The Court, accordingly, gave detailed consideration to the current status of railroad and highway transportation, and noted the following facts with respect to the purpose, necessity and responsibility for construction of rail-highway grade separations as of that time:

1. There have been "revolutionary changes" in trans-

portation in recent years brought about "by the widespread introduction of motor vehicles." The phenomenal increase in truck, bus and automobile traffic, and the relative decline of railroad business are facts which must be considered in determining the reasons for, and the chief beneficiaries of, modern grade separation structures.

2. In the pre-automobile era, "the occasion for separation of grades was mainly the danger incident to rail operations; and the promotion of safety was then the main purpose of grade separation. Then, it was reasonable to impose upon the railroad a large part of the cost of eliminating grade crossings; and the imposition was rarely a hardship." Now, however, the reasons for constructing grade separations are very different.

> "The main purpose of grade separation therefore is now the furtherance of uninterrupted, rapid movement by motor vehicles. In this respect grade separation is a desirable engineering feature comparable to removal of grades and curves, to widening the highway, to strengthening and draining it, to shortening distance, to setting up guard rails, and to bridging streams. The railroad has ceased to be the prime instrument of danger and the main cause of accidents. It is the railroad which now requires protection from dangers incident to motor transportation."

3. In earlier days, "the highways were then feeders of rail traffic, * * * and every improvement of highway facilities benefited the railroads." Now, however, roads are not primarily feeders of traffic to the railroads but are the rights-of-way of the railroad's principal competitors. Thus, "Separation of grades serves to intensify the motor competition and to further deplete rail traffic."

4. The tremendous growth of the highway transportation industry has taken away much of the railroads' freight business and an even greater share of the passenger business. Yet, despite this relative decline in their revenues,

the railroads must continue to pay for the maintenance of their own roadways and, in addition, to pay heavy state and local taxes, while the taxes paid by truck and bus owners "are clearly insufficient to pay their fair share even of the cost and maintenance of the highways which serve them."

5. The federal government, through its federal-aid highway program, has paid a large proportion of the cost of building highways throughout the country. This has greatly advanced the competitive position of highway vehicles and served further to deplete rail traffic.

Having taken cognizance of the changed conditions brought about by the transportation revolution, which now make grade separations essentially *public* improvements built for the *public* benefit, this Court held that "the promotion of public convenience will not justify requiring of a railroad any more than of others, the expenditure of money, unless it can be shown that a duty to provide the particular convenience rests upon it" and pointed out that "so-called assessments for *public* improvements laid upon particular property owners are ordinarily constitutional *only if based on benefits received by them.*"

C. Since 1935, the year of the *Nashville* decision, the progress of the "transportation revolution" has been greatly accelerated, as the motor vehicle has become a more and more important factor in the economy and life of the nation. In California trucks now receive over 75% of the total gross revenues for intrastate transportation of property, while railroads receive less than 20%. In excess of 90% of all passenger transportation throughout the United States is over the highways.

The grade-separation projects here involved illustrate the continuing progression of the factors referred to by this Court in the *Nashville* case. In the *Santa Fe* case, for example, an existing two-lane separation will be replaced

with a six-lane structure which is necessitated, not by any change in railroad operations, but solely by the increase in vehicular traffic, which includes a tremendous flow of trucks from the nearby industrial area to their destinations throughout California and other states. Thus, the construction of a new six-lane viaduct, with vertical clearance of 15 feet to accommodate huge trailer-trucks, will result in great benefit to the Santa Fe's highway competitors, but very little or none to the railroad.

Inasmuch as the grade separation involved in the *Nashville* case was held to be essentially a *public* improvement under conditions existing in 1935, it follows *a fortiori* that the grade separations here involved, under present-day transportation conditions, are also primarily public highway improvements dictated by the needs of highway traffic and of primary benefit to owners of highway vehicles. Accordingly, to impose an assessment upon a railroad for grade separation costs without reference to, and greatly in excess of, any benefit it will receive therefrom, is arbitrary and unreasonable and takes the railroad's property for public use without compensation, contrary to the requirements of the Fourteenth Amendment.

D. The "benefit principle" applied in the *Nashville* case, namely, that a railroad may be assessed for grade separation construction costs only in an amount representing a fair estimate of the benefits it will receive therefrom, has been widely adopted and reflected in substantially the whole body of thinking in the field, by impartial boards and committees, by governmental bodies and their experts, and indeed by the California Commission itself for many years prior to its decisions in the instant cases. The only explanation offered by the Commission for its present rejection of the benefit principle and return to the practice of making arbitrary assessments against the railroads without regard to benefits, is that "the tremendous increase *in motor*

vehicle traffic presents a new problem"—the very factor which led both this Court and the Commission itself to adopt the benefit principle nearly 20 years ago.

E. The arbitrary imposition of huge grade-separation costs upon the railroads without regard to the benefits they will receive therefrom is also violative of the Commerce Clause of the Constitution of the United States (Article I, Section 8, Clause 3) and of the National Transportation Policy declared by Congress, 54 Stat. 899 (1940). The National Transportation Policy declares that regulation of all modes of transportation must (1) promote adequate, economical and efficient service and foster sound economic conditions among the several carriers, and (2) recognize and preserve the inherent advantages of each.

The State of California is now embarked on a tremendous grade separation construction program. 294 separation projects have been proposed by a state legislative committee for the state highway system alone, while within the County of Los Angeles it is proposed to build 157 additional separations. If the vast cost of these projects may be charged to the railroads on a purely arbitrary basis, unrelated to their benefits therefrom, the National Transportation Policy will be defeated in two important respects:

First, the economic burdens will be so heavy that they cannot be met without sacrificing present standards of efficiency and economy of railroad operations. In such cases, "the state interest is outweighed by the interest of the nation in an adequate, economical and efficient railway transportation service, which must prevail." *Southern Pacific Company* v. *Arizona*, 325 U. S. 761, 783-84 (1945).

Second, to require the railroads to pay the cost, in excess of benefits received, of constructing what are essentially highway improvements, thus directly subsidizing their strongest competitors, constitutes a preferment by the State

of one form of transportation over the other, contrary to the Congressional policy of equality and impartiality of treatment.

F. The orders of the California Public Utilities Commission authorizing and directing construction of the grade separations here involved and apportioning costs of construction are "statutes" of a state within the meaning of Title 28 U. S. C. Section 1257(2), and these cases are therefore properly before this Court on appeals, rather than writs of certiorari. The orders are not divisible but entire, and the fact that appellants do not contest the propriety of that portion of the orders directing construction of the projects is of no significance. *Grand Trunk Western Ry. Co.* v. *Railroad Commission*, 221 U. S. 400 (1911). But whatever the Court's decision as to whether appeal or certiorari is the proper jurisdictional route, the questions presented are properly before this Court, by reason of the provisions of Title 28 U. S. C. Section 2103.

ARGUMENT.

I.

THE ORDERS OF THE CALIFORNIA COMMISSION ASSESSING 50% OF THE COST OF CONSTRUCTING CERTAIN GRADE SEPARATIONS AGAINST APPELLANTS TAKE THEIR PROPERTY WITHOUT JUST COMPENSATION CONTRARY TO THE FOURTEENTH AMENDMENT.

A. The Problem.

In 1938 the Interstate Commerce Commission, in its annual report to Congress, made this statement:

> "Whether it realizes it or not, the country has in fact experienced a transportation revolution in a very short space of time. The automotive highway vehicle has been the principal factor in this revolution. In the carriage of persons, it is now by far the most important means of transportation, and in the carriage of property it is growing in importance every day." 52nd Annual Report of I. C. C. (1938), p. 17.

This "transportation revolution," which has seen the number of automobiles registered in the United States increase from 8,000 in 1900 to over 42 millions in 1951, has completely rewoven the fabric of American life. Because of its impact, large cities have been created and others have declined; once-important industries have been abandoned, while new industries have arisen in their stead. In countless ways the daily life of the country is affected by the tremendous growth of the automotive industry.

How best to send a huge and ever-increasing volume of highway traffic to its destination quickly, directly, and with a minimum of delay has posed a serious and continuing engineering problem. Great highways capable of carrying these millions of vehicles had to be constructed; old roads

that proved incapable of carrying present day traffic loads are being reconstructed. Public works projects of almost incredible magnitude have been carried out, and non-stop superhighways span increasingly large sections of the nation.

One of the most difficult facets of the problem of expediting the flow of highway traffic has been the necessity of eliminating delays incident to the intersection of opposing streams of traffic. While a number of different expedients have been devised, it has been found that the only satisfactory solution where the traffic is particularly heavy is to separate the grades at the point of intersection by means of a bridge, so that one stream may flow uninterruptedly over the other. The Virginia highway approaches to Washington, D. C., present familiar examples of this kind of construction.

A similar difficulty exists in the case of railroad-highway intersections. Prior to the advent of the automobile, a few rail-highway grade separations had been built as safety measures, but the overwhelming majority of crossings remained at grade. With the "transportation revolution," however, has come an increasingly insistent demand on the part of highway users—truck and bus operators and ordinary motorists—for elimination of railroad grade crossings and the delays necessarily incident to such crossings. As was stated by the Director of the Institute of Transportation and Traffic Engineering of the University of California in 1950:

> "During the past two or three years there has been mounting public interest in, and pressure for, increased railroad-highway crossing separation. It would appear that this pressure, which may be taken as a measure of an unfilled need, is out of proportion to the accident hazard on the public highways. It would appear further, that this pressure derives, in

considerable measure, from irritation on the part of an ever-increasing driving public, over delay factors rather than accident hazard.'"[5]

The cases now before this Court are good examples of this development. In the *Santa Fe* case a grade separation presently exists. But, because truck, bus and automobile traffic has multiplied a hundred-fold in recent years, a six-lane road is now deemed to be necessary where two lanes originally sufficed, and as a result the present viaduct must be replaced with a much larger one. There is here no question of danger or accidents from railroad operations. Indeed, the Santa Fe has had no costs whatever for property damage or personal injury claims at its Washington Boulevard crossing since 1914, when the present separation structures were built (AR. 45). The Commission itself specifically found that the new construction is necessitated wholly "by the increase in vehicular and pedestrian traffic" (AR. 141).

Like so many desirable public projects, the construction of grade-separation structures is immensely expensive. The structures involved in the *Santa Fe* case are estimated to cost $569,355, while the separation involved in the *Southern Pacific* case will cost at least $1,493,200. The California Commission estimated in 1949 that to eliminate all grade crossings on main and branch lines within the State would cost approximately two and one-half *billion* dollars,[6] and present grade separation proposals run into many millions. A report to the California Assembly's Joint Fact-Finding Committee on Highways in 1952 recommends construction of 273 new railroad separation structures and reconstruction of 21 existing separations,

[5] Davis, *The Railroad Grade Crossing Problem*, Proceedings of Engineering Section, 1950 Governor's Traffic Safety Conference (California), p. 31.

[6] Public Utilities Commission of California, "General State-Wide Grade Crossing Survey" (AR. 24).

a total of 294, on the *state highway system alone.*[7] In addition, proposed separation projects on county roads and city streets which are not a part of the state highway system run into the hundreds. In 1951, for example, a sub-committee of the Los Angeles Grade Crossing Committee found necessary the construction or reconstruction of separations at 157 crossings *within the County of Los Angeles.*[8] And the City of Fresno alone presently has on file with the Commission an application requesting new construction to eliminate grade crossings in that city, the first step of which is estimated to cost $14,168,520! Since the cost of separation projects now actively and officially proposed in the State of California alone may well reach $200,000,000, it is not strange that the Commission's abrupt departure from the benefit principle and its adoption of the position that it may arbitrarily assess grade separation costs against appellants as an exercise of the police power should be of surpassing importance to the parties concerned.

B. The Position of the Parties.

The question of who must pay for the construction of railroad-highway grade separations is not a new one. Years ago, a number of cases presenting this question reached this Court and the appellate courts of the States. In these early cases the dominant consideration was the protection of intermittent horse-and-buggy traffic from speeding railroad locomotives. Since the railroad was considered a dangerous instrumentality which had created the safety problem by running its equipment across public

[7] *California Highways,* An Engineering Study of Improvements Required to Serve Present and Future Travel prepared for Joint Fact-Finding Committee on Highways, California Legislature (1952), p. 53.

[8] Report dated January 5, 1951 by sub-committee of Los Angeles County Grade Crossing Committee. See SR. 123, SR. App. 24.

thoroughfares, this Court held that a State, in the exercise of the police power, could constitutionally order the railroad to remove that danger by erecting a grade separation at its own expense. Accordingly, as early as 1914 this Court could say:

> "It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings but also to build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their tracks or to carry their tracks over such highways." *Chicago, M. & St. P. Ry. Co.* v. *Minneapolis*, 232 U. S. 430, 438 (1914).

It is upon this and similar early decisions[9] that the Commission now relies.

These cases, at the times and under the circumstances in which they were decided, undoubtedly stood for the broad proposition stated in the *Minneapolis* case. Subsequent to these decisions, however, this Court had before it another rail-highway grade separation case in which, for the first time, the Court was apprised of "the revolutionary changes incident to transportation wrought in recent years by the widespread introduction of motor vehicles." *Nashville, C. & St. L. R. Co.* v. *Walters*, 294 U. S. 405, 416 (1935). In that case a state statute imposing 50% of the costs of constructing rail-highway grade separations against the railroad involved was challenged on the ground that such a special assessment, under present-day transportation conditions, appropriates the railroad's property without just compensation, contrary to the Fourteenth

[9] In support of the proposition that it may assess all, or any part, of the costs of constructing a grade separation against the railroad, the Commission cited this Court's decisions in *Erie R. Co.* v. *Board of Public Utility Commissioners*, 254 U. S. 394 (1920); *Chicago, M. & St. P. Ry. Co.* v. *Minneapolis*, 232 U. S. 430 (1914); *Missouri Pacific Ry Co.* v. *Omaha*, 235 U. S. 121 (1914); and *Lehigh Valley R. Co.* v. *Board of Commissioners*, 278 U. S. 24 (1928) See AR. 128-129.

Amendment. Recognizing that the law governing this question was "well settled" contrary to his position as long ago as 1914, counsel for the railroad frankly stated in his brief to this Court:

> "The revolution in transportation and the incidental grade-crossing problem necessitates a restatement of the ancient and obsolete rules of law with reference thereto." See 79 L. Ed. 952.

This Court, in an opinion by Mr. Justice Brandeis, reversed the judgment of the state supreme court, which had refused to consider the problem in the light of the recent significant changes in transportation conditions brought about by the highway motor vehicle. While reiteration of the Court's statement in the *Minneapolis* case (*supra*, p. 23) would have disposed of the appeal if it had been the Court's intention, notwithstanding changed conditions, to reapply the rule there stated, this Court pointed out, instead, that changes in conditions must be considered: "A statute valid when enacted may become invalid by change in the conditions to which it is applied." 294 U. S. 415. This Court then detailed at considerable length the facts in the record or within judicial notice which demonstrated that grade separations are no longer constructed primarily because of the danger incident to rail operations, as was true when the "rule" now relied upon by the Commission was formulated, but are designed and built essentially for the purpose of speeding continuous streams of truck, bus and automobile traffic past intersecting railroad lines. As this Court noted in its opinion:

> "The main purpose of grade separation therefore is now the furtherance of uninterrupted, rapid movement by motor vehicles. In this respect grade separation is a desirable engineering feature comparable to removal of grades and curves, to widening the highway, to strengthening and draining it, to shortening dis-

tance, to setting up guard rails, and to bridging streams. The railroad has ceased to be the prime instrument of danger and the main cause of accidents. It is the railroad which now requires protection from dangers incident to motor transportation." 294 U. S. 421-422.

This Court's opinion in the *Nashville* case demonstrated beyond question, first, that under the changed transportation conditions prevailing as early as 1935 grade separations are essentially *public* improvements, since it is the public which reaps the greater share of the benefits of grade crossing elimination; and second, that in most cases the lion's share of the "public" benefit goes to the railroad's competitors, the trucking and motor bus companies, since any highway improvement automatically reduces the costs and increases the efficiency of their operations. Thus, to the extent that a railroad is assessed more for construction of a grade separation than it receives in benefits therefrom, it is being required to bear the cost of a *public* improvement which results in substantial direct benefits to its chief competitors.

With these conclusions drawn from a consideration of the "revolutionary changes" brought about by the widespread introduction of the motor vehicle, this Court stated the applicable legal principles as follows:

"The Supreme Court of Tennessee erred in refusing to consider whether the facts relied upon by the Railway established as arbitrary and unreasonable the imposition upon it of one-half the cost of the underpass. The promotion of public convenience will not justify requiring of a railroad, any more than of others, the expediture of money, unless it can be shown that a duty to provide the particular convenience rests upon it. * * *

"It is true that the police power embraces regulations designed to promote public convenience or the general welfare, and not merely those in the interest

> of public health, safety and morals. * * * But when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured. [Citations.] While moneys raised by general taxation may constitutionally be applied to purposes from which the individual taxed may receive no benefit, and indeed, suffer serious detriment; [citations] *so-called assessments for public improvements laid upon particular property owners are ordinarily constitutional only if based on benefits received by them. Myles Salt Co.* v. *Iberia & St. M. Drainage Dist.*, 239 U. S. 478; *Gast Realty & Invest. Co.* v. *Schneider Granite Co.*, 240 U. S. 55; *Kansas City S. R. Co.* v. *Road Improv. Dist.*, 256 U. S. 658." 294 U. S. at 428-430.

In short, this Court concluded that grade separations having become, in practical effect, *public* improvements designed and built primarily for the *public* benefit, their costs cannot be assessed arbitrarily against the railroads, but are ordinarily constitutional "only if based on benefits received by them," citing cases involving the constitutionality of special assessments levied against adjacent property owners for the construction of public improvements affecting their property.

The principle that a State may not, under either the taxing power or the "police power," force an arbitrarily selected few to carry the burdens or promote the conveniences of the general public has long been established as a basic tenet of American constitutional law. In 1897 this Court, speaking through Mr. Justice Harlan, held unequivocally that the Fourteenth Amendment to the Constitution requires that just compensation be paid for property taken by a State for public or private use, just as the Fifth Amendment requires payment of just compensation by the federal government. *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226 (1897). Cases involving special

assessments, among them those cited by Mr. Justice Brandeis in the *Nashville* case, well illustrate this principle. For example, in *Myles Salt Co.* v. *Iberia Drainage District*, 239 U. S. 478 (1916), where certain lands containing salt deposits were included in a drainage district and assessed a tax for construction of drainage improvements which would benefit other lands in the district but could not possibly benefit the salt company, this Court unanimously held the assessment unconstitutional, stating:

> "We are not dealing with motives alone but as well with their resultant action; we are not dealing with disputable grounds of discretion or disputable degrees of benefit, but with an exercise of power determined by considerations not of the improvement of plaintiff's property but solely of the improvement of the property of others—power, therefore, arbitrarily exerted, imposing a burden without a compensating advantage of any kind." *Id.*, at 485. See also, *e.g.*, *Kansas City Southern R. Co.* v. *Road District*, 256 U. S. 658 (1921).[10]

We assume that it would not be disputed, therefore, that the Commission could not constitutionally order one of the appellants to pay the cost of constructing a public park, swimming pool or library, except as it pays taxes on the same basis as any other individual or corporation. It is appellants' contention that, to a far greater extent than in 1935, when the *Nashville* case was decided, grade separations are now also essentially *public* improvements constructed at the insistence of those who operate motor vehicles and for their benefit. To the extent that the railroad also benefits from construction of the separation, through elimination of the expense of crossing gates or other safety devices and reduction of accident claims, for example, it must of course contribute to the cost of the

[10] Similar conclusions have been reached by this Court when the attempt to impose public burdens upon individuals was made under the State's "police power." See *Chicago, St. P., M. & O. Ry. Co.* v. *Holmberg*, 282 U. S. 162 (1930) and cases cited.

new structure, just as adjacent property owners pay the cost of public improvements according to the benefits they receive. *Kansas City Southern Ry. Co. v. Road District*, 266 U. S. 379 (1924); *Myles Salt Co. v. Iberia & St. M. Drainage District*, 239 U. S. 478 (1916). But to the extent that a grade separation is constructed to further the convenience and improve the economy of another mode of transportation, the cost cannot logically and properly be assessed against one who receives no benefits.

The Commission avoids the application of the principles just stated by the convenient expedient of ignoring the undisputed facts surrounding present-day transportation conditions and relying upon the State's "police power," as applied in the grade separation cases of the horse-and-buggy era. In the Commission's view, the *Nashville* case "can have no bearing on the problem" because it "is applicable only to the factual situation there presented." (Alt. 179.) In thus "distinguishing" the *Nashville* case and returning once more to the rule applicable to the facts of the pre-automobile age, however, the Commission ignores the fact, which the Court will immediately discern from reading the opinion of Mr. Justice Brandeis, that the central theme, the core of the decision, is the fact that a "transportation revolution" has occurred; that the responsibilities of users of the highways and the railroad respectively, and the benefits accruing to each from grade separation construction, have changed materially with the coming of the automobile age and the new era in transportation. In this essential element the *Nashville* case has not been and cannot be distinguished.

C. The Present Inquiry.

The *Nashville* case was decided upon the basis of the facts available to the Court in 1935. At that time, as the opinion points out in analytical detail, the "transporta-

tion revolution" had brought about dramatic changes in travel and transportation practices. Through the great growth in motor vehicle use the highways had become a great independent system of transportation, competitive with the railroads. The change in the necessity, purpose and chief beneficiaries of grade separation construction was already sufficiently marked at that time that this Court properly described such separations as *public* improvements.

As we shall demonstrate, however, subsequent events have shown that as of 1935 the "transportation revolution," while very real, was still in its incipiency. Since that time the ownership and use of motor vehicles have increased to heights not dreamed of 18 years ago. Competition from motor vehicles has taken increasingly greater proportions of freight and passenger business formerly handled by railroads. As a result, grade separations constructed today, even more than in 1935, reflect the phenomenal growth of competitive *highway* transportation, rather than an expansion of railroad facilities, as was the case at the turn of the century.

The marked and extreme progression of the "transportation revolution" from the time of the *Nashville* decision to the present will be examined in some detail *infra*. But some of its features should be pointed out initially to indicate the sharp and continuing ascent of the curve of highway transportation. Since 1935, the number of automobiles in the United States has increased over 88%, to a total, in 1951, of 42,500,000. During that same period, truck and bus registration has increased an outstanding 143%, while the number of units of railroad equipment of all categories has declined. During the same 16 year period following the *Nashville* decision, moreover, the number of miles of surfaced roads outside of cities increased

by 75%, while the number of miles of railroad lines operated in the United States was declining by nearly 20,000.

These figures are reflected in statistics showing the extent to which highway vehicles have supplanted railroads as carriers of passengers and freight in recent years. In the *Nashville* case the Court declared: "Separation of grades serves to intensify the motor competition and to further deplete rail traffic." (294 U. S. at 423.) In 1951, 16 years later, 87% of all *intercity* passenger miles were traveled by automobile, 6% additional by motor bus, and only 7% by train. Between 1936 and 1951 the amount of freight hauled by intercity trucks increased by 350%. And because motor freight is higher rated traffic than railroad freight, on the average, intercity motor carriers in 1950 received 47.1% as much freight revenues as did the nation's railroads, despite enormous differences in operating expenses and costs of plant and equipment. In an official statement of American Trucking Association, Inc., which is presently receiving wide publicity, it is declared that "on the basis of all tons of freight moved, trucks haul 75% of the total." See *Time*, Aug. 31, 1953, p. 3.

The railroads have lost almost all of some types of traffic to motor carriers. An expert witness testified without contradiction in the *Santa Fe* case that highway competition has taken from the railroads almost all freight business within a distance of 50 miles from the larger cities (AR. 24). And the upsurge of motor carriers as the *principal* carriers of intrastate freight traffic is demonstrated by the fact that in California, in 1951, highway carriers received 75.7% of all gross operating revenues received by carriers for intrastate transportation of property, whereas the railroads received only 19.3%!

It should be apparent even from this brief resumé that the trends in transportation practices—the "transporta-

tion revolution"— which this Court noted in the *Nashville* case have continued with ever-increasing impetus to the present time. If imposition of an arbitrary percentage of the costs upon the railroad was a taking of property for a *public* use without just compensation in 1935, it follows *a fortiori* that such an arbitrary assessment, under present-day conditions, violates established constitutional principles.

But because the Commission has refused to follow this Court's latest decision on the subject and regards that decision as "applicable only to the factual situation there presented" (AR. 179), appellants consider it desirable to point out in somewhat greater detail the full reach of the revolution in transportation conditions that has taken place in the past 50 years, and notably the acceleration of the trend in the years since the *Nashville* case was decided.

In the *Nashville* case, Mr. Justice Brandeis set out the factors for consideration in determining whether an arbitrary assessment of grade separation costs upon the railroad was unjust and unreasonable as follows:

> "The charge of arbitrariness is based primarily upon [1] the revolutionary changes incident to transportation wrought in recent years by the wide-spread introduction of motor vehicles; [2] the assumption by the Federal Government of the functions of road builder; [3] the resulting depletion of rail revenues; [4] the change in the character, the construction and the use of highways; [5] the change in the occasion for elimination of grade crossings, in the purpose of such elimination, and in the chief beneficiaries thereof; and [6] the change in the relative responsibility of the railroads and vehicles moving on the highway as elements of danger and causes of accidents." 294 U. S. at 416.

With these considerations as guides, we shall indicate the

development of the various phases of the problem to the date of the *Nashville* case and their subsequent history as shown in the record and by facts of which this Court may take judicial notice.

1. "The Revolutionary Changes Incident to Transportation Wrought in Recent Years By the Introduction of Motor Vehicles."

The "horse-and-buggy" days are receding rapidly from the memories of men into the pages of history. But to those who remember the days when the automobile was a new and rare object, the changes brought about by the automobile, the truck and the bus are awe-inspiring. For nearly a century after the steam locomotive demonstrated its superiority over the horse-drawn vehicle on the tracks of the Baltimore and Ohio Railroad, the railroad was considered the ideal instrument for public transportation. Towns and cities were established along the line of the railroad and were dependent upon it for commerce and communication. Except for farm vehicles used for local distribution of supplies, little or no freight was transported overland except by railroad. And apart from carriages used for short journeys, all overland passenger travel was also by railroad. It was upon the "particular facts" pertinent to this era that this Court upheld state action requiring the railroads to pay the entire cost of building grade separations.[11]

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[11] The importance of the "particular facts" presented in a case involving a taking of property for public use was emphasized by Mr. Justice Holmes in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 413 (1920):

> "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation, and must yield to the police power. But obviously the implied limitation

Statistics present a dramatic picture of the change in transportation practices with the advent of the motor vehicle. In 1900, only 8,000 automobiles were registered in the United States, and no trucks or buses had been manufactured. By 1915 less than 2,500,000 automobiles were registered, but in the next fifteen years the number had leaped to nearly 23,000,000, an increase of 820%. Since 1935, the year of this Court's decision in the *Nashville* case, the number of automobiles has increased from approximately 22,500,000 to over 42,500,000 in 1951, an increase of over 88%, despite the fact that few automobiles were manufactured during the war years.[12] Automobile ownership has increased so much faster than the population that there is now an automobile for every 2.6 persons over 18 years of age in this country, whereas in 1910 there was only one automobile for every 125.2 persons over 18.[13]

Even more extreme has been the recent increase in truck registration. In 1900 no trucks were registered in the United States, and in 1915 only 158,506. By 1930, however, the number had increased to over 3,500,000. Since the *Nashville* case was decided in 1935, the number of trucks in this country has increased by 143% to a 1951 total of over 8,500,000. During that same period the number of motor buses has increased by the same percentage figure.

But mere numbers of vehicles do not begin to tell the story of the change in transportation conditions in recent

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must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. *So the question depends upon the particular facts.*"

[12] Automobile, truck and bus registration figures for the years 1900-1951 are contained in Table 1 of Appendix A to this brief.

[13] Bureau of Public Roads, *Highway Statistics 1950*, p. 17.

years. In its *Nashville* opinion this Court referred to the fact that:

> "Trucks, some of them 70 feet in length and many weighing with load as much as 50,000 pounds, operated by common carriers, by contract carrier and by private concerns, will compete for the most profitable classes of freight." 294 U. S. at 426.

Since the time of that decision, the size and carrying capacity of the average truck have increased tremendously. In 1936, the average loads carried by trucks on main rural roads was only 2.90 tons and by combinations (trailer trucks) was 6.90 tons. By 1951, the average load carried by trucks had risen to 5.66 tons and by combinations to 10.83 tons, increases of 95% and 57% respectively.[14]

The modern truck is not only capable of carrying heavier loads but can carry them faster and farther than its predecessors. This combination of factors is reflected in figures showing the number of ton-miles carried by trucks. In 1936, the year following the *Nashville* decision, trucks and combinations carried 28,005 million ton miles over main rural roads, but that figure had been more than doubled by 1941, and in 1951 had reached the amazing total of 126,402 million, an increase over 1936 of 350%![15]

To keep pace with this momentous increase in the number, size and use of highway vehicles, a huge system of primary and secondary roads has been construed with a corresponding multiplication of the number of railroad crossings. The fact that there was almost no overland travel, except by railroad, during the nineteenth century is well illustrated by the fact that there existed only 153,530 miles of surfaced rural roads in the United States in 1904. By 1935, however, that figure had risen to 1,063,000 miles,

[14] See Bureau of Public Roads, *Highway Statistics, Summary to 1945*, p. 31 and *Highway Statistics, 1951*, p. 28.

[15] See Table 2 of Appendix A to this brief.

an increase of 525%; and by 1951 there were 1,723,175 miles, another increase of 75%.[16]

It is of especial significance that in contrast to this tremendous upsurge of highway development and use, and as a direct result of the inroads of truck and automobile competition, railroads have not been able to expand their facilities in proportion to the increase in population and national income. Indeed, Class I railroad mileage reached its peak more than twenty years ago when 408,237 miles were operated and has declined steadily ever since to a 1951 total of 382,575. Main-line trackage today is actually less than in 1914.[17]

A similar trend is disclosed by the figures as to ownership of railroad locomotives, passenger cars and freight cars. The high point of locomotive ownership was in 1924, when 65,358 were being operated by Class I railroads. As of 1935 that figure had already been reduced to 46,594, and during the intervening years locomotive ownership has dropped another 6,000 units. It should be noted that this is 18,000 fewer locomotives than were in service in 1911![18]

Passenger-car ownership has shown a similar history. From a peak of 55,040 units in 1924, ownership of passenger cars by Class I railroads has now dropped to 36,130, which is over 10,000 fewer cars than were in service in 1911.[19]

Freight-car ownership has followed a pattern similar to, but not identical with, ownership of locomotives and pas-

[16] See Table 3 of Appendix A to this brief. It is also significant that the percentage of *surfaced* roads to total road mileage, which was only 13% as recently as 1921, had risen to 58% by 1951. *Ibid.*

[17] See Interstate Commerce Commission, *Statistics of Railways in the United States.*

[18] *Ibid.*

[19] *Ibid.*

senger cars. From 1915 freight cars owned by Class I carriers rose gradually to a peak of 2,387,551 in 1925, and then began a decline comparable to those of the other components. In 1941 the decline was temporarily halted because of the extraordinary demands upon the railroads created by mobilization and production for war, but after 1945 the decline commenced anew. As a result, there are now over 500,000 fewer freight cars in service on Class I railroads than in 1915[20]; and these have proved fully adequate to meet the demands of the shipping public.

It should be emphasized also that while the carrying capacity and general efficiency of railroad equipment has improved during this period, there has been an even greater increase in the size and efficiency of trucks and busses. Thus, more significance is given the fact that the units of railroad equipment have substantially declined in number, while highway vehicles have greatly multiplied.

In the case of many transportation services, highway vehicles have almost entirely superseded use of railroads. For example, 89% of all farm products reach their market by highway; 85% of the nation's urban population receive their fluid milk from the country by truck; and 65% of the country's livestock go to market by truck. It has been estimated that use of trucks serving agriculture has risen 60% since 1941 and 1,700% since 1920.[21] Furthermore, where towns were usually centered closely around the railroad station in earlier days, "Suburban areas, whose building was largely the result of highway transportation, now represent 34 per cent of all metropolitan populations."[22]

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[20] *Ibid.*

[21] National Highway Users Conference, Inc. *The Highway Transportation Story* (1950), p. 5.

[22] *Id* at p. 24. A Michigan survey showed that of 850,000 workers, 635,000 depended on cars to reach their work. *Ibid.*

The importance of the relative decline in railroad transportation and growth of highway transportation is twofold: First, it indicates clearly the purpose and necessity of modern grade-separation structures. As will be pointed out below (*infra*, pp. 50-52), prior to general use of the motor vehicle, grade separations were constructed primarily if not entirely as safety measures. Since the railroad had created the hazard, it was thought reasonable and proper, particularly in view of its virtual monopoly over public transportation, to require the railroad to remove that hazard at its own cost.

Today, however, it is primarily the increase in the number and size of motor vehicles that makes grade separations necessary. As was recently stated by Dr. A. Kenneth Beggs, Senior Economist of Stanford Research Institute, in an extended analysis of the railway-highway grade crossing problem:

> "The demand for grade crossing improvements and eliminations since 1920 has arisen not only from considerations of public safety but more importantly from increasing use of the nation's highways and the resulting desire to reduce traffic delays and congestion on the highway system."[23]

In its decision in the *Santa Fe* case the Commission found that this was the necessity to be served by the new construction in Washington Boulevard, stating:

> "• • • The reasons advanced by applicant for widening the underpasses, which reasons were not disputed by protestant, were the increase in motor vehicle traffic, both passenger and commercial, the need to make Washington Boulevard a through street for its entire length, the need for a bus line to transport passengers through that area, and the inadequate height of the present underpass. It was pointed out that the height of the

[23] Beggs, *The Railway-Highway Grade Crossing Problem* (Stanford Research Institute, Stanford, Cal. 1952), p. 3.

underpass should be increased so as to provide adequate clearance for commercial vehicles." (AR. 141-2.)

In both cases the Commission found that the construction or enlargement of the grade separation was justified by the prospective benefits to users of the highways. In neither case was safety or benefit to the railroad a significant factor in the Commission's determination.

The second major fact arising out of the coming of age of the motor vehicle is that streets and highways are no longer primarily feeders of business to the railroad but constitute, instead, the rights-of-way of its chief competitors. Thus, where grade separation structures once served the railroad's purposes by enabling horse-drawn vehicles to drive safely up to the railroad depot, they now serve primarily to speed up the service and reduce the costs of the railroad's competitors. In the *Nashville* case this court stressed the fact that in the days before motor vehicles became commercially important:

> "* * * the need for eliminating existing crossings, and the need of new highways free from grade crossings, arose usually from the growth of the community in which the grade separation was made; this growth was mainly the result of the transportation facilities offered through the railroad; the separation of grade crossings was a normal incident of the growth of rail operations; and as the highways were then feeders of rail traffic, the community's growth *and every improvement of highway facilities benefited the railroad.*" 294 U. S. at 423.

No such situation existed at the time of the *Nashville* decision or exists today, but rather the contrary. Taking California as an example, census figures show that between 1920 and 1950 the State's population has more than tripled, having increased from 3,426,861 to 10,586,223.[24] During

[24] Statistical Abstract of the United States, 1952, pp. 13, 14.

that same period, however, the miles of railroad operated in California actually *decreased* approximately 10%, from 8,356 miles to 7,533 miles.[25] On the other hand, California state highway mileage increased by an astounding 596.9%, from only 2,008 miles in 1920 to 13,994 miles in 1949 (AR. 20). We direct the particular attention of the Court to the figures assembled by a committee of the California Senate, showing that in 1951 the steam railroads received only 19.3% of the gross revenue for the intrastate transportation of property in California, while highway carriers took 75.7%.[26]

It is thus perfectly apparent that California's remarkable recent growth has not been "mainly the result of the transportation facilities offered through the railroad," *supra*, but instead reflects and is reflected by the great increase in *highway* traffic. Furthermore, the fact that, despite the tremendous growth of California's population and highway mileage, the State's railroad facilities have remained relatively static is conclusive proof that, under modern transportation conditions, improvement of highway facilities not only does not materially benefit the railroads but gives vital aid to their competitors.

This is particularly true in the cases now before this Court. In the *Southern Pacific* case the uncontradicted evidence is that Los Feliz Boulevard is a major traffic artery, along which vehicular traffic originating or terminating in the metropolitan area of Los Angeles travels en route to Antelope Valley, the Palm Springs area, and to state highways leading to the San Joaquin and Sacramento Valleys and the San Francisco Bay area, all of which are also served by the Southern Pacific (SR. App. 105-108). The record shows that on week-days an average of over 1,000 trucks,

[25] *Id.*, p. 507.

[26] See Table 4 of Appendix A to this brief.

tank trucks and truck-trailer combinations (excluding light panel trucks) use the Los Feliz crossing daily (SR. App. 91), and it is expected that present and contemplated changes in the Los Angeles highway system will substantially increase that flow (SR. App. 106, 110-112).

A similar situation exists in the case of the Washington Boulevard crossing of the Santa Fe. A principal witness for the City of Los Angeles testified that during a test period over 2,000 cars and trucks per hour went through the present underpasses, that over 25% of the vehicles using the present underpass were trucks, and that if the underpasses under the Santa Fe's tracks were enlarged it was his opinion that more large trucks would use the Washington Boulevard (AR. 18, 19). With respect to the nature of the traffic using Washington Boulevard, this witness gave the following testimony:

> "Q. Can you characterize Washington Boulevard as an important thoroughfare for trucks or a truck route? I don't know what your language is in traffic engineering but could you describe it from the standpoint of truck useage?
>
> "A. Well, the best answer to that is first, you have got to have origin and destination. Your trucks that move east and west, south of the congested area have an objective. They are going to, in the main, either up the coast or to Sepulveda Boulevard or into the Valley or going either to the Harbor. The center of gravity is Washington and Alameda and from that point they move out in the four directions. Now, truckers, it has been my experience, based on studies, that truckers will seek their own level. In other words, the drivers seek out certain routes, dependent upon their objectives. It happens to be that Washington Boulevard is in a good position in relation to the other phases of traffic problems that they seek out Washington Boulevard as the center, from the center of industry, Harbor and it connects to the four trade winds from the hinterland." (Tr. 114, AR. 18.)

The Santa Fe presented evidence that construction of the new underpass would not increase its business but on the contrary, would enhance the trend toward diversion of traffic to trucks (AR. 16, 30, 123, 124). Arthur C. Jenkins, a consulting engineer with many years experience in the transportation field, testified that:

> "In the early period of our history, highways served largely as feeders to the railroads. Today, highways operate as the arteries of competitive traffic, and competition has taken over practically all types of transportation from the railroad within a distance of 50 miles from the larger cities." (AR. 24.)

He also pointed out that "the volume of traffic, of truck traffic on Washington Boulevard compared to the total traffic is a greater percentage than is found generally on the other state highways on which I have obtained figures" (AR. 26, Tr. p. 300). Moreover, a state highway engineer testified that Washington Boulevard "is a so-called primary or major highway built to major highway standards" (AR. 32). The Commission itself stated:

> "According to the evidence presented, the widening of the underpass is now necessitated by the increase in vehicular and pedestrian traffic. The area in the vicinity of the two underpasses here under consideration has become one of the leading industrial areas of Los Angeles and its environs. As a result, there is a large amount of motor truck traffic hauling to and from these areas" (AR. 141).

Thus, in assessing against the railroad arbitrary costs in excess of the benefits it receives from a grade separation, the Commission is, in effect, ordering the railroad to subsidize its competitors, the truck and motor bus industries. If, as the Commission has found, in respect of the two separations here involved, the benefits to users of the street justify the new construction, *supra*, pp. 7, 11, those persons

can and should be required to pay for the benefits they receive. But to require the railroad to pay an arbitrary 50% of the cost of this kind of public improvement and in addition to pay its share of general taxes,[27] thus contributing very substantially to the payment of the other half of the cost, is clearly unjust. In the *Nashville* case this Court said:

> "* * * Separation of grades serves to intensify the motor competition and to further deplete rail traffic. The avoidance thereby made possible of traffic interruptions incident to crossing at grade are now of far greater importance to the highway users than it is to the railroad crossed. For the rail operations are few; those of motor vehicles very numerous." 294 U. S. at 423-24.

Those considerations weigh even more strongly today against an arbitrary allocation of co[illegible].

2. "The Assumption By the Federal Government of the Functions of Road Builder."

As this Court has indicated, nothing more strongly emphasizes the nature and extent of the "transportation revolution" than the role played by the federal government as "Road Builder", and the position of the government as to the allocation of the cost of grade separations (this brief, *infra*, p. 62). Prior to 1900 practically all roads were under the control of local officials. There was, of course, no gasoline tax, no highway use tax and few vehicle taxes. All funds for construction and maintenance of roads necessarily came from general property taxes laid upon landowners in the taxing district.[28] Since highways were so little used

[27] It was pointed out in the *Nashville* case that while nearly 28% of the gross revenues of a railroad are required annually to pay state and local taxes and the cost of maintaining its roadway, commercial motor carriers moving on public roads contribute only 7% of their gross revenues in state and local taxes. 294 U. S. 427-28. That ratio is now even more disproportionate (AR. 22).

[28] Beggs, *op. cit. supra*, (note 23), p. 4.

there were, in short, no public funds available for large-scale highway improvements. If the railroads had not been required to bear the cost of grade separations, none would have been built.

In 1916, however, the federal government initiated the present system of providing federal aid to the states for highway purposes. By the Federal Road Act of 1916, 39 Stat. 355, Congress made available an initial appropriation of $75,000,000 to be apportioned among the states in proportion to their area, population and post road mileage. It also required participating states to establish state highway departments.

The Federal Highway Act of 1921, 42 Stat. 212, established the present Primary Federal Aid Highway System and provided that up to 50% of the cost of constructing such highways would be furnished by the federal government. By the Hayden-Cartwright Act of 1934, 48 Stat. 995, the Bureau of Public Roads was enabled to extend federal aid to roads outside the primary system and to establish the Federal Aid Secondary System. Congress made annual appropriations for the support of these programs, and under these basic statutes was built the gigantic network of roads that now crosses and criss-crosses the nation.

The pattern for comprehensive improvements for the succeeding 20 years was laid down by the Federal Aid Highway Act of 1944, 62 Stat. 1105, in which specific grants were assigned for aid to construction on the Federal Aid System in rural and urban areas and for the Federal Aid Secondary System. The Act provided for federal contributions to the extent of $500,000,000 in each of the first three postwar years, and in 1948 the Act was extended for a period of two years with annual authorizations of $450,000,000. The Federal-Aid Highway Act of 1950, 64 Stat. 785, once more increased annual authorizations to $500,000,000 a year for the

following two years, and the Federal-Aid Highway Act of 1952 has increased that amount by $50,000,000 annually for fiscal years 1954 and 1955.

The federal aid program has become the backbone of the nation's highway system. Between 1916 and 1943, the Bureau of Public Roads approved federal appropriations of over $3,000,000,000 to the states for highway purposes,[29] and of course more billions of dollars have since been granted to the States, beginning with the 1944 Act. For the period from June 30, 1917 through June 30, 1950, the State of California alone has received $265,194,138, which is over 18% of the total revenues received by the State Division of Highways from all sources during that period.[30] Since many federal aid highways go through cities, the federal government has aided cities as well as States to improve their street facilities. In fact, every Federal-Aid Highway Act since 1944 has contained a specific authorization for federal aid to highways in urban areas, the 1952 Act authorizing grants of $137,500,000 for this purpose.

Thus, the federal government has furnished tremendous impetus to the spectacular growth of motor vehicle transportation. It is as a direct result of federal legislation that state highway departments were first organized and state highway programs initiated. It is also as a result of the federal government's action that highways of relatively uniform construction, capable of carrying the heavy loads to which they are now subjected, were built.

In addition to acting as a supervising and coordinating agency, the federal government has granted vast sums of money to the states for construction of roads, highways, and city streets. Without these grants, it is unques-

[29] Labatut and Lane, *Highways in Our National Life* (1950), pp. 91-93.

[30] See Third Annual Report of Division of Highways of California Department of Public Works, p. 57.

tioned that the thick network of highways which now blankets this country would never have been constructed.

The result of the federal government's program has thus been to improve the operating cost and efficiency of all highway vehicles. The program has made it possible for trucks, motor buses and private automobiles to operate at high speeds along direct routes without the enormous expenditures otherwise required to build private rights-of-way. In sum, the federal government has had a large part in the rise of the motor vehicle as an important and growing carrier of freight, and by far the most important carrier of passengers.

3. "The Resulting Depletion of Rail Revenues."

This Court knows judicially that the nation's economy has experienced rapid growth during the twentieth century, and that dollar-wise that growth has been accentuated by the marked decrease in the purchasing value of the dollar. National income has risen from $87.3 billions in 1929 to $277.5 billions in 1951,[21] and even in terms of constant dollars the increase has been large.[22]

While the nation's railroads have, of course, made gains over the past 30 or 40 years in terms of dollars of revenue and income and tons of freight hauled, the gains have not been at all commensurate with the growth of the nation's economy or with the declining value of the dollar. Competition from other forms of transportation, principally highway carriers, has substantially reduced the railroads' share of the nation's transportation dollar.

Motor freight is higher rated traffic than railroad freight,

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[21] Statistical Abstract of the United States, 1952, p. 255.

[22] Gross national product in constant (1939) dollars has increased nearly 100% in the past 25 years, from $85.9 billions in 1929 to $167.3 billions in 1951. *Id* at p. 254.

on the average, and the rise in revenues of the trucking industry, as compared with the railroads, has thus been particularly significant. In the 10-year period, 1940-1950, alone, the percentage of motor carrier freight revenue to railroad freight revenue nearly doubled, rising from 24.2% in 1940 to 47.1% in 1950.[33] The declining proportion of railroad revenues is also shown by the fact that, whereas in 1939 railroad operating revenues amounted to 5.6 cents of every dollar of national income, that figure had shrunk to 3.7 cents per dollar of national income in 1952.[34] In short, the trucks have not only taken substantial amounts of business from the railroads, but the traffic they have taken has been of the most profitable kind formerly carried by rail.

The shift of short-haul business has, of course, been even more extreme. The Santa Fe's witnesses testified that trucks have taken nearly all the short-haul traffic from the railroads (AR. 27, 38), and this conclusion is well illustrated by the fact that in California, in 1951, highway carriers received nearly three-fourths of the gross revenue from transportation of property within California, leaving only 19.3% for the steam railroads.[35]

It is well known that the shift of passenger traffic from the railroads to the highways has been equally striking. In 1929, for example, buses handled 22% of all intercity passenger business by railroad and highway, excluding private automobile traffic, while the railroads handled 78%. By 1951, on the other hand, the proportion carried by buses had risen to 43% and by railroad had declined to 57%.[36]

But the "revolution" has been most drastic in its shift of railroad passenger traffic to the private automobile. In 1929, automobiles already accounted for over 154 *billion*

[33] See Table 5 of Appendix A to this brief.

[34] I. C. C. Bureau of Transport Economics and Statistics, *Monthly Comment*, dated August 12, 1953, p. 10.

[35] See Table 4 of Appendix A to this brief.

[36] See Table 6 of Appendix A to this brief.

intercity passenger miles, compared with approximately 24 billion passenger miles for the railroads. By 1951, private automobile transportation had more than doubled, to a new total of 362 billion passenger miles, while railroad passenger miles had risen only slightly to 30.6 billions.[37] As of 1951, therefore, travel by highway (automobile and bus) represented nearly 93% of the total passenger miles traveled by rail and highway, while the railroads' proportion had shrunk to approximately 7%.

These facts and figures are recited not for the purpose of pleading that, because railroads have lost their former position in the transportation field, they are entitled to public largesse or preferment over other forms of transportation. They are vital, however, as showing, first, that in view of the relative decline in railroad revenues and the contemporaneous increase in highway revenues, it is wholly unreasonable to require the railroads to construct highway improvements for the benefit of vehicular traffic which is largely competitive; and second, that the great and increasing commercial importance of highway transportation justifies imposition of such costs upon those who benefit directly from the use of the highways.

4. "The Change in the Character, the Construction and the Use of Highways."

No extended discussion is necessary to demonstrate to the Court the tremendous advances in highway construction in recent years. In 1904, when the first national survey of roads was made, there existed only 153,662 miles of surfaced roads in the United States, of which all but a fraction were of gravel or stone construction. Paved roads did not become common until after the World War I, and the early paved roads usually consisted of only two lanes, each 7 to 9 feet in width.

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[37] *Ibid.*

The modern highway is often of 6 or more lanes in width, as is true in both cases now on appeal, and present highway lanes are usually 9 to 11 feet wide. Dual highways, limited-access superhighways and turnpikes, all of which involve numerous grade separations at points of intersection with other highways and railroads, are becoming increasingly common in all sections of the country.

The use made of the highways under modern transportation conditions has changed in quite as marked degree as the highways and vehicles themselves. Speed of movement is one obvious illustration. In 1901 the first law regulating the speed of automobiles was passed in Connecticut, and provided a limit of 12 miles per hour on the highway and 8 miles per hour in cities. As late as 1918 legal speed limits ranged from 15 to 30 miles per hour in all but one state, which permitted speeds of 40 miles per hour.[38] Today legal maximum speed limits range from 40 miles per hour in some states to 70 miles per hour in others, and in a few states there is no stated maximum.

Engineering surveys made by the United States Bureau of Public Roads have developed information with respect to the distribution of traffic in the United States. In the course of these surveys 565,703 vehicles were counted at 536 stations throughout the country. Of these vehicles 427,620 or 75.6% were automobiles, 7,940 or 1.4% were buses, and 129,849 or 23.0% were freight vehicles.[39] It was also found that over 50% of all single unit trucks were over 20 feet in length, while well over half of all tractor-truck and semi-trailer combinations were over 32 feet long, including some over 50 feet in length. Over 21% of all trucks were 8 feet in width or over, while another

[38] Public Roads Administration, *Highway Practice in the United States of America* (1949), p. 7.

[39] Bulletin 116 of Agricultural and Mechanical College of Texas (Jan. 1, 1950): *Highway Loads and Their Effects on Highways*, pp. 15-21.

44.9% were seven feet or more in width. With respect to heights, most trucks were under 12.5 feet, but some ran as high as 14 feet and over.[40] A majority of the buses counted in the survey (54.1%) were between 30.1 and 54.9 feet in length, while 64.1% were 8 feet or more in width.[41] Thus, while 7 foot lanes and 10 to 12 foot vertical clearances were adequate to serve early automobile traffic, modern truck and bus dimensions, together with the need for an additional safety factor due to high speeds of travel, have made necessary 9 to 11 foot lanes and 14 to 15 foot vertical clearances.

Another indication of the increasing use to which highways are being put in the United States is supplied by annual traffic counts taken by the California Division of Highways. A count taken on a Sunday and Monday of each year at the midpoint on Route 99 between Los Angeles and San Francisco shows the following results:[42]

Year	Trucks	Buses	Autos	Total
Sunday—				
1924				2,862
1928				3,522
1930	229	13	3,907	4,149
1940	930	34	6,321	7,285
1950	1,576	137	16,803	18,516
Monday—				
1924				2,175
1928				2,660
1930	389	13	2,712	3,114
1940	1,265	32	4,204	5,501
1950	2,607	139	13,925	16,671

[40] One reason advanced for the new Washington Boulevard structure is to increase the vertical clearance from 13'8" to 15 feet to accommodate larger trucks.

[41] Institute of Traffic Engineers, *Traffic Engineering Handbook* (1950), pp. 13-16.

[42] California Division of Highways, records of annual traffic counts.

Thus, the increase in week-day total traffic between 1924 and 1950 was 666%, and between 1940 and 1950 the increase was 203%. Similar results were obtained at other check points.

These facts and figures do not adequately tell the story. But they do indicate that the public road has become a very different thing in character, in construction and in use since the days of the horse and wagon. Even the highways being built in 1935, when the *Nashville* case was decided are old-fashioned by modern standards.[43] Six-lane roads, such as those involved in the present cases, are becoming commonplace. The dominant purpose of the new roads now under construction is to speed up, to reduce the cost and to improve the efficiency of what has become a great new system of transportation. The grade separation is an integral part of that plan, and it is no different from any other element of highway design in respect of its purpose and justification.

5. "The Change in the Occasion for Elimination of Grade Crossings, in the Purpose of Such Elimination, and in the Chief Beneficiaries Thereof."

There can be no disputing the fact that, until the automobile became an efficient and widely adopted means of transportation, the almost invariable reason for requiring construction of grade separations was to remove the accident hazard. There was little economic incentive for separating grades, since delays were of small consequence, both because of slow speeds and because of relative infrequency of vehicular traffic. Indeed, as was pointed out in a report to the Massachusetts legislature in 1889, rail-

[43] It may not be doubted also that it was a thin trickle of commercial trucks that moved over the Tennessee highway there involved in 1934 in comparison with the swollen stream of railroad competitive traffic now using Washington and Los Feliz Boulevards.

road lines were originally laid at grade level with the express consent of the community, and grade separations were ruled out because "people protested against changing grade of streets."[44] No doubt horse-drawn vehicles were impeded more by the inclined approaches usually necessary in grade separation construction than by having to wait while trains cleared the crossing.

The fact that the accident hazard was the source of almost all agitation for separation of grades in the years preceding the "transportation revolution," and was the principal basis for assessing the cost against the railroad which created that danger, is clearly shown by the decisions of this Court and the courts of the several states approving such assessments. See *e. g., State* v. *St. Paul, M. & M. Ry. Co.*, 98 Minn. 380, 108 N. W. 261 (1906). Mr. Justice Brandeis pointed out in the *Nashville* case:

> "Early cases establishing the rule that the entire cost of a grade separation may be imposed upon the railroad perhaps reflect the attitude that 'the business of railways is specially dangerous,' *Thorpe* v. *Rutland & B. R. Co.*, 27 Vt. 140, 150, 62 Am. Dec. 625; and that 'crossing highways and running locomotives, were they not authorized by law, would be nuisances.' Mr. Justice Strong, dissenting in *Northwestern Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659, 679." 294 U. S., at 429 (footnote 37).

In every case in which this Court sustained the power of the states to assess the full amount of a railroad-highway grade separation against the railroad, the justification therefor was always the state's authority, under the police power, to promote the public safety. In *Missouri Pacific Ry. Company* v. *Omaha*, 235 U. S. 121, 127 (1914), for example, this Court said:

> "This is done in the exercise of the police power,

[44] Report of an Investigation into the Subject of the Gradual Abolition of Crossings of Highways by Railroads at Grade," a report to the Massachusetts Legislature dated January 31, 1889, pp. 17-18.

> and the means to be employed *to promote the public safety* are primarily in the judgment of the legislative branch of the government, to whose authority such matters are committed, and so long as the means have a substantial relation to the purpose to be accomplished, and there is no arbitrary interference with private rights, the courts cannot interfere with the exercise of the power by enjoining regulations *made in the interest of public safety* which the legislature has duly enacted."

Similarly in *Erie R. Co.* v. *Board of Public Utility Commissioners*, 254 U. S. 394, 410, this Court stated that "the authority of the railroads to project their moving masses across thoroughfares must be taken to be subject to the implied limitation that it may be cut down whenever and *so far as the safety of the public requires.*"

This Court summarized its holdings in the earlier grade separation cases in *Panhandle Eastern Pipe Line Co.* v. *State Highway Commission*, 294 U. S. 613, a case decided within a month after the *Nashville* decision. This Court there held that a pipe line company may not be required, without compensation, to make changes in its transmission lines necessitated by the construction of highways across its right-of-way; the opinion refers to the railroad crossing cases as follows:

> "The rule in respect of railroad crossings applies *when there is substantial risk of injury to the public from the operation of trains*, and ground to imply the company's consent to take such measures as may be necessary *to prevent the hazard*. This Court has not sanctioned extension of the rule to wholly dissimilar circumstances; it *does not apply to structures which are unattended by serious danger to the public.*" 294 U. S. at 622.

If, then, danger to the public was originally the occasion for both the construction of grade separations and

the imposition of costs of such construction upon the railroads, it becomes highly relevant to inquire whether that factor is the basis of the Commission's orders in the cases before the Court.

Manifestly, it is not. There is no pretense that danger from railroad operations is the occasion for either of the separations here involved. In the *Santa Fe* case a separation now exists, and no claim is or could be made that dangers incident to railroad operations contribute in any way toward the necessity of widening and heightening the present structures. On the contrary, the Commission itself found in its original opinion that "the widening of the underpass is now necessitated by the increase in vehicular and pedestrian traffic" (R. 141) and stated unqualifiedly:

> "Thus we are specifically faced with the problem of who shall pay the cost of widening of the underpass where the necessity for such widening is *not due to the activities of the railroad but rather to the needs of the automotive and pedestrian traffic.*" (AR. 142.)

Similarly, the proposal to eliminate the Southern Pacific's Los Feliz grade crossing, which is equipped with modern crossing gates and warning devices, is not based upon the accident hazard but upon elimination of highway traffic congestion, as the City's application demonstrates (SR. App. 4-5). In addition, the record in the Southern Pacific case adequately demonstrates that, with the existing protection, there is virtually no hazard whatever at the Los Feliz crossing. Despite the fact that about 27,000 vehicles per day traverse this crossing, accidents have been negligible and it could not reasonably be contended, and the Commission did not suggest, that public safety requires or would warrant the tremendous expenditures ordered by the Commission.

As a matter of fact, throughout the United States the

elimination of railroad-highway grade crossings is no longer considered as a problem of public safety but of transportation economics. Those most concerned with highway safety are first to point out that, if money is to be spent in eliminating highway accident hazards, there are far more critical safety problems than that presented by the railroad grade crossing. The Director of the Institute of Transportation and Traffic Engineering of the University of California has stated:

> "Because railroad grade-crossing accidents are often spectacular and receive wide publicity, conceivably there is danger that the grade crossing problem could be overemphasized and thus detract needed support from more critical highway safety problems."[45]

And a 1951 report of a California legislative fact-finding Committee concludes:

> "The accident factor, or hazard, while frequently mentioned in hearings and public demands for separations, does not appear alone to be sufficient justification for the construction of separation structures. Studies of the Public Utilities Commission and others, indicate that, in general, safety can be obtained much less expensively by use of modern protective devices."[46]

The accuracy of these conclusions can be demonstrated in several ways. In the first place, railroad crossing accidents have decreased in comparison with all highway accidents in California from 8.5% of the total in 1930 to only a little more than 1% in 1951.[47] The number of per-

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[45] Davis, *The Railroad Grade Crossing Problem*, proceedings of Engineering Section, 1950 Governor's Traffic Safety Conference (California), p. 28. See also, *e.g.*, Minnesota Legislative Research Commission, *Grade Crossing Accidents in Minnesota* (1948), Introduction.

[46] Third Report of The Assembly Interim Fact-Finding Committee on Tideland Reclamation, Etc. on the Railroad-Highway Crossing Problem in California (1951), p. 10.

[47] *Id.* at p. 31.

sons killed and injured at grade crossings shows a similar trend. In 1915 there were 21.5 casualties per 10,000 vehicles attributable to grade crossing accidents in California, while in 1949 that figure had dwindled to 2.0.[48]

The change in the occasion and purpose of grade crossing elimination has necessarily brought with it a change "in the chief beneficiaries thereof." This fact is well illustrated by the results of a study prepared jointly by the parties in the *Southern Pacific* case and referred to by the Commission in its opinion (SR. App. 27-29). As a result of that study it was estimated that delay at the Los Feliz crossing results in an annual cost to highway vehicles of $57,362 (SR. App. 28, 87), and that those who use the highways will therefore benefit in that amount every year as a result of the construction of a grade separation.

The study also found that the Southern Pacific now expends a total of $14,528 annually in crossing protection (SR. App. 28, 29, 87). While construction of a separation will eliminate this expense, additional expenses in the form of depreciation and maintenance of the new structure at a yearly cost of $8,611 will reduce the railroad's net annual benefit to $5,917. The result in that the benefit to the railroad from the construction of a grade separation at Los Feliz Boulevard will be only approximately 10% of the total, as against a 90% benefit to users of the highway.

It is paradoxical indeed that, while the Commission utilized these figures in determining that the economic benefit to all parties from the proposed separation justified its construction, it disregarded them competely in apportioning the costs as between the parties so benefited. To assess the costs of construction equally between the railroad and the public is to disregard completely the fact that

[48] *Ibid.* The nationwide average for 1949 was 1.11 per 10,000 automobiles. Beggs, *op. cit. supra* (note 23), p. 18.

the "chief beneficiaries" of a grade separation are no longer the railroad but the users of the highway.

6. "The Change in the Relative Responsibility of the Railroads and Vehicles Moving on the Highways as Elements of Danger and Causes of Accidents."

Among the facts which this Court stated in the *Nashville* case had been found by the trial court to be true or were subject to judicial notice was the following:

> "The railroad has ceased to be the prime instrument of danger and the main cause of accidents. It is the railroad which now requires protection from danger incident to motor transportation." 294 U. S. at 422-23.[49]

This statement is amply borne out by the facts. In a report of the National Safety Council delivered to the 37th National Safety Congress, the principal causes of accidents occurring at grade crossings are stated as follows:

1. The motorist fails to observe and obey crossing warning signs and signals.

2. The motorist sees the train approaching but misjudges the speed.

3. The motorist waits for one train to clear then starts across, but is struck by another train approaching from the opposite direction.

4. The motorist is so familiar with the crossing, having passed over it hundreds of times, that he uses no caution.

5. The motorist has defective eyesight, defective hearing, or both, or is otherwise physically or mentally deficient.

6. The motorist has too much alcohol in his system.

7. The motorist, driving at night over familiar terri-

[49] In a footnote, this Court noted that accidents caused by motor vehicles running into trains amounted in 1928 to 22% of the total grade crossing accidents; in 1929 to 24%; in 1930 to 26.5%; in 1931 to 28.6%; in 1932 to 30.6%; and in 1933 to 31.3%.

tory, drives at a speed too great for conditions existing, consequently, he cannot stop in time.

8. The motorist drives a faulty car and is unable to stop or start at the proper time, or stalls his car on the crossing.[50]

The report further points out that the intersection of a railroad line and a highway is no different, from the point of view of safety, from the intersection of two highways, and that there is no reason why responsibility for accidents caused by vehicle drivers should be assigned to the railroads, stating:

> "* * * by tradition dating back to the horse and buggy day, there has fallen upon the railroad the major burden of protecting the crossing. The railroads can stop the motorist by thrusting a gate down in front of him. They can swing a red lantern or wave a red flag in his face. They can whistle at him, but it is not possible for the railroads themselves to educate the motorist on the highway and certainly it is not possible for the railroads to police them."[51]

In California, as in substantially all other states, the Commission has authority over the installation, usually with the railroad meeting half or more of the expense, of safety devices at grade crossings. Modern automatic devices are virtually foolproof in design and performance and give unmistakable and ample warning of approaching trains. Nevertheless, at grade crossings, as elsewhere, some motorists will disregard signals, drive at excessive speeds, drive while intoxicated, or otherwise endanger their own lives and the lives of others. Except for the fact that railroad crossings are much better guarded than ordinary highway intersections, there is no significant difference between the two.

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[50] *Report of Highway-Railroad Crossing Committee*, Transactions of 37th National Safety Congress, Vol. 27, p. 35.

[51] *Ibid.*

The facts stated above lead inevitably to one conclusion, namely, that the factors considered by this Court in the *Nashville* case to demonstrate that the assessment of 50% of the costs of constructing a grade separation against the railroad without regard to the benefits to the railroad is arbitrary and unreasonable have expanded and multiplied in the years since that decision was handed down. The "transportation revolution" then in progress has proceeded to an extreme which could scarcely have been envisioned in 1935. The trends there referred to have all continued—and with added impact. The ultimate conclusion which this Court reached in the *Nashville* case and must necessarily reach again is that the railroad-highway grade separations is a public highway improvement "*comparable to removal of grades and curves, to widening the highway, to strengthening and draining it, to shortening distance, to setting up guard rails, and to bridging streams.*" 294 U. S. at 422. To the extent that the railroad benefits, it must pay. But there is no logical or reasonable basis upon which the railroad may be "singled out to bear the cost of advancing the public convenience" or to pay the *public's* share of a *public* improvement. The California Commission's orders assessing 50% of the costs of these separation structures against the respective appellants do precisely that.

D. The Views of Experts and Informed Opinion Everywhere Reject the Arbitrary Assessment of Grade Separation Costs Against Railroads.

Because the problem of accommodation here presented is so widespread and has occasioned so much reasoned consideration, it is relevant to inquire as to the views of experts, informed persons and government bodies toward the question before this Court. If doubt had been thrown upon the *Nashville* decision by time and experience, if it had

been impeached on the ground of justice or logic or found to be at odds with subsequent informed public and professional opinion, this Court might conclude that it was either incorrectly decided or that it should now recognize changed conditions. On the other hand, if this Court's analysis and conclusions have met wide acceptance and approval, the California Commission's action must be regarded as regressive.

1. The Views of Experts and Informed Persons and Groups.

The heart of the opinion in the *Nashville* case is the conclusion that the facts there presented indicated that grade separations are now in essence public improvements, and that:

> "* * * so-called assessments for public improvements laid upon particular property owners are ordinarily constitutional only if based on benefits received by them." 294 U. S. at 430.

The view that a railroad should have to pay toward construction of a grade separation only in the amount of the "benefits" it receives had been advanced by several impartial groups even prior to this Court's decision.

On January 30, 1933, the Joint Committee of Railroad and Highway Users recommended:

> "State laws requiring railroads to make capital expenditures for grade-crossing elimination in excess of capitalized savings in operating expenses therefrom should be repealed. In computing the savings the only items to be considered are those of a tangible nature, such as relief from employment of watchmen, crossing tenders or automatic devices, maintenance of crossing and the like. When the foregoing principles are accepted, each case should be considered on its merits and final decision as to whether the crossing should be eliminated and, if to be done, the division of the cost should be determined jointly by the Public

Service Commission and the Highway Commission of the State."[52]

The same conclusion was reached the following year (1934) by the National Conference on Street and Highway Safety, which stated:

"Progress with railroad grade-crossing elimination continues slow, largely due to the policy of placing upon the railroads a large part of the cost of improvements needed because of the rapid increase in motor traffic. In the interest of expediting elimination of the hazards of grade crossings, the public should assume a larger share of the expense and that of the railroads should be limited to the resulting capitalized savings in their operating expenses of a tangible nature, such as relief from employment of watchmen, crossing tenders or automatic devices, maintenance of crossings and the like."[53]

In 1938, two years after this Court's decision in the *Nashville* case, Mr. Joseph Eastman, the Federal Coordinator of Transportation, published a voluminous report entitled "Public Aids to Transportation." In volume II of this report extended consideration was given to the question of the proper allocation of costs of constructing grade separations. The analysis of the benefits to the various parties concerned arising out of construction of a grade separation is prefaced with these remarks:

"The conception of the responsibility for the elimination of grade crossings here expounded, which is in line with actual developments over many years in the States and with Federal participation under Federal aid acts and during the depression, gives major importance to the question of convenience and to the

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[52] *Regulation and Taxation of Highway Transportation*, a report of the Joint Committee of Railroads and Highway Users dated January 30, 1933, p. 15.

[53] *Guides to Traffic Safety*, a report approved by the Fourth National Conference on Street and Highway Safety, p. 29.

competitive relations of rail and motor transportation. * * * Analysis of the varied benefits which the elimination or adequate protection of grade crossings confers appears to be the only means of approach, in general terms, of how far railroads will or may be required to bear grade crossing costs in the future."[54]

The same year a committee was appointed by the President of the United States to submit recommendations on the general transportation situation, and its report, dated December 23, 1938, concluded:

"There has been a tendency recently for Congress and the courts to recognize that the problem of separating railroad grade crossings is a public problem, of much greater interest to travelers on the highways than to the railroads. It is obviously unfair that the railroads should be required to meet these heavy expenditures which are made more for increasing capacity and expediting highway traffic than for considerations of safety."[55]

More recently Dr. Beggs has made a most complete and detailed analysis of the question of proper allocation of grade separation construction costs. He concludes, with respect to this problem:

"The *economic* benefits and services taken into account in each case are those which accrue to the general public, to highway users, and to the railroads. The ratio of the net benefits for each beneficiary to total net benefits should determine allocation of costs."[56]

The author further concludes that a policy of assigning

[54] Federal Coordinator of Transportation, *Public Aids to Transportation* (1938), Vol. II, p. 279.

[55] Report of "Committee Appointed September 20, 1938, by the President of the United States to Submit Recommendations Upon the General Transportation Situation," dated December 23, 1938, p. 24.

[56] Beggs, *op. cit. supra* (note 23), p. 47.

costs for grade crossing improvements to railroads on the basis of a fixed percentage of total costs, as in the present cases, "is no more realistic or economically sound than is an assumption that the economic nature and character of the grade crossing area, crossing usage, and highway development and usage may be identical as between grade crossings."[87]

Thus, the Commission, in asserting the right to assess all of the separation cost against the railroad, this being embraced in the asserted power to assess an arbitrary percentage of the cost, flies in the face of the great weight expert and informed judgment on the subject. It is the opinion of all impartial groups which have studied the matter that it is neither fair to the railroads, economically sound, nor in the interest of a progressive highway program to require the railroad to pay an amount in excess of its benefit from the construction.

2. The Position of the Federal Government.

In the Federal-Aid Highway Act of 1944, 58 Stat. 838, the Congress expressly recognized and adopted the benefit principle as the proper basis upon which the costs of constructing railroad-highway grade separations should be apportioned. As stated above, that Act authorized the annual appropriation of $500,000,000 in federal funds to the states for use on the Federal-aid highway system, on principal secondary and feeder roads, and in urban areas. Section 5(b) of the Act deals specifically with allocation of grade separation costs and provides in part:

> "(b) Any railway involved in any project for the elimination of hazards of railway-highway crossings paid for in whole or in part from funds made available under this Act, shall be liable to the United States for a sum bearing the same ratio to the net benefit

[87] *Ibid.*

received by such railway from such project that the Federal funds expended on such project bear to the total cost of such project bear to the total cost of such project. For the purposes of this subsection, the net benefit received by a railway from any such project shall be deemed to be the amount by which the reasonable value of the total benefits received by it from such project exceeds the amount paid by it (including the reasonable value of any property rights contributed by it) toward the cost of such project, and in no case shall the total benefits to any railway or railways be deemed to have a reasonable value in excess of 10 per centum of the cost of any such project."

Benefits to the railroad, the standard referred to in the *Nashville* case as appropriate for allocating costs of public improvements, is thus the federal standard. And recognition of the fact that grade separations, under present circumstances, are chiefly of benefit to users of the highway has led Congress to impose a maximum payment by the railroad of 10% of the cost of the project, insofar as federal funds are concerned.

Moreover, in administering this statute the Public Roads Administration has ruled that when existing grade separations are replaced with larger structures, as is true in the *Santa Fe* case, the new construction "shall be considered as not resulting in ascertainable benefits to the railroad, and consequently no contribution to the cost of such project by the railroad shall be required."[58]

3. The History of Grade Separation Assessments in California.

One of the most unusual features of the present cases is the fact that for many years prior to the decisions under review the California Commission itself recognized and

[58] Public Roads Administration, General Administrative Memorandum No. 325, dated August 26, 1948.

followed the benefit principle in allocating the costs of grade separation structures. Indeed, the Commission anticipated this Court's decision in the *Nashville* case by several years. As has been stated, an application to replace the Santa Fe's Washington Boulevard grade separation was granted by the Commission in 1932 but never acted upon by the City of Los Angeles. In its order authorizing the construction the Commission allocated the costs of the project 25% to the Santa Fe and 75% to the City, basing its departure from its previous practice of making 50-50 allocations on this ground:

> "There can be no question that the vehicular public will receive the greatest benefit from the widening of these separations, so it logically follows that this class of the public should bear the greater portion of the cost."[59]

During the following year, which was two years prior to this Court's decision in the *Nashville* case, the California Commission elaborated on its reasons for abandoning the practice of arbitrary allocations in a decision known as the *Goshen Junction* case. The basis of the decision is so similar to that of the *Nashville* case and so fundamentally at variance with the Commission's present position that the following excerpt from the Commission's opinion is commended to the especial attention of the Court:

> "In allocating the costs here we are departing from the practice which has obtained generally heretofore of assessing one-half to each the public and the railroad in case of an existing grade crossing. While this procedure has appeared equitable in the past, *the tremendous changes in transportation conditions make necessary a reappraisement of the liabilities of the two parties at interest.* The railroad still continues to be

[59] *Application of the City of Los Angeles* (Decision No. 25069), 37 C. R. C. 784, 787 (1932).

the aggressor in preventing the free and unhampered use of the public thoroughfare, but the needs of the traffic on the highway have not only increased and changed in nature, but *the use of the highway has become in large measure directly competitive with the rail line.* These and incidental conditions following them have changed the benefits flowing from the separation of grades between these two great avenues of traffic.

"After carefully considering all the evidence in these proceedings, it is concluded that the order should authorize the grade separation, as proposed, and fix the amount to be contributed by the railroad in a lump sum based upon direct and indirect benefits. This sum is arrived at by capitalizing an amount measuring the annual benefits and privileges on a 6 per cent basis. If applicant elects to proceed with the construction of the separation, where according to the record there is some question as to its present economic justification, it shall bear the remainder of the cost and choose the width of subway it desires to construct."[60]

During the same year the Commission in three other decisions adhered to the benefit principle[61] and from 1933 to 1949, when the Commission's original order in the *Santa Fe* case was handed down, there was no question that California grade separation assessments were to be determined upon the basis of relative benefits.[62] As a result, during that period the Southern Pacific's proportion of the cost

[60] *Application of the Department of Public Works* (Decision No. 25551), 38 C. R. C. 380, 386 (1933).

[61] *Application of the Department of Public Works* (Decision No. 25588), 38 C. R. C. 425; Same (Decision No. 25811), 38 C. R. C. 606; Same (Decision No. 25812), 38 C. R. C. 612.

[62] In reply to a questionaire reported in the Proceedings of the 45th Annual Convention of the National Association of Railroad and Utilities Commissioners (1933), in which the question was asked as to what percentage of the cost of eliminating grade crossings is borne by the railroad and state or municipality, the California Commission answered: "Not fixed. Some cases by agreement, others by Commission allocation as measured largely by benefits." (p. 489).

of constructing grade separations was generally 10% or less, except where a new railroad line was built across an existing roadway (SR. App. 92-97). The Santa Fe's experience was very similar.

The Commission's strange about-face in reverting to its pre-1932 position of arbitrarily allocating grade separation costs is shrouded in mystery. In its opinion in the *Santa Fe* case the Commission concedes long adherence to the benefit principle but then states:

> "However, this record discloses that material changes have taken place in conditions at the present time as compared to those in 1932. As we said in Decision 43374, *supra*, 'The great increase in population and the tremendous increase in motor vehicle traffic present a new problem.'" (AR. 129).

This statement is incongruous in the extreme. It is the very changes in conditions brought about by the increase in motor vehicle traffic, which the Commission now says "present a new problem," that led the Commission to adopt the benefit principle in the first place. And it is this very change in conditions that moved this Court, in the *Nashville* case, to hold that imposition of all, or an arbitrary proportion, of grade separation costs upon the railroad was unjust and unreasonable. In short, the Commission now relies upon an extreme progression of the "transportation revolution" which caused it to abandon arbitrary assessments against the railroads in 1932 as the reason for a return to that practice.

4. The Practice in Other States.

The present action of the California Commission is in direct opposition to that of practically every other state taken since the *Nashville* decision was handed down. Since 1935, every new state enactment on the subject, without ex-

ception, has either expressly adopted the benefit basis of allocation or has fixed the railroad's share of grade separation costs at a low percentage figure designed to approximate actual benefits.

An outstanding example of the general public acceptance of the *Nashville* doctrine is the action taken by New York in 1938. In that state a constitutional amendment, approved by the voters, was necessary to formal adoption of the benefit principle. A bi-partisan campaign in the legislature and in public forums resulted in overwhelming approval of an amendment to Article 7, Section 14 of the state constitution to provide that the expense of any grade crossing elimination work is to be borne in the first instance by the State, which may then recover from the railroad as reimbursement:

> "(1) the entire amount of the railroad improvements not an essential part of elimination, and (2) the amount of the net benefit to the company or companies from the elimination exclusive of such railroad improvements, the amount of such net benefit * * * in no event to exceed fifteen per centum of the expense of the elimination."

Since 1938, therefore, New York's tremendous highway and grade separation program has been carried out on the benefit principle.

Other states have enacted similar measures. In 1939, Michigan adopted a statute apportioning grade separation costs "according to benefits, but not to exceed 15 per cent thereof by the railroad or railroads interested and the balance thereof by the state, or subdivision thereof."[63] In 1951, Minnesota adopted an amendment to its statute providing that "the division of the costs between the railroad and the state shall be on the basis of benefit to each."[64]

[63] Mich. Stats. Anno., Title 9, § 9.1145.

[64] Minn. Stats. Anno., ch. 219, § 219.40.

Nebraska, in 1949, provided that grade separation costs in cities and villages shall be apportioned between the city and the railroad in such proportions "as the board shall find the public and railroad company or companies are respectively benefited."[65] And in 1952, the Virginia legislature substituted for an arbitrary percentage apportionment statute a provision directing allocation of costs on the basis of what "is fair and reasonable, having regard to the benefits, if any, accruing to such railroad or railroads from the elimination of such grade crossings."[66] And the statutes of Massachusetts, even prior to 1935, had provided that separation costs should be apportioned between the railroad and the public "equitably and in accordance with the relative benefit to be derived by each from such alterations."[67]

Since the *Nashville* decision, moreover, the following states have adopted statutes limiting railroad participation in grade separation costs to specified percentages which are indicated by experience to represent maximum actual benefits to railroads: Indiana—20% when eliminating existing crossing, nothing when no crossing exists;[68] Maryland—25%;[69] New Jersey—15%;[70] New Mexico—10%;[71] and Ohio—15%.[72]

It is thus apparent that since this Court's recognition of the "transportation revolution" in 1935, and that of the California Commission two years earlier, there has been a notable change in public policy with respect to the responsi-

[65] Rev. Stats. of Nebraska, 1943, § 18-621.

[66] Code of Virginia, 1950, § 56-366.1.

[67] Anno. Laws of Mass., ch. 159, § 70.

[68] Burns Indiana Stats., § 55-1810.

[69] Flack's Anno. Code of Maryland, 1951, Art. 89B, § 41.

[70] N. J. Stats. Anno., §§ 48:12-62 and 48:12-70.

[71] N. Mex. Stats. of 1941 Anno., § 74-338.

[72] Page's Ohio Gen. Code Anno., §§ 8868, 8883.

bility of the railroads for costs of crossing separation. The realization that grade separations are now necessitated by and constructed primarily for the benefit of highway transportation has led to general recognition of the equitable principle that the railroad's costs should be limited to *its* benefits. This Court's conclusion, in 1935, that a state's refusal to take cognizance of the great changes in transportation conditions is arbitrary and unreasonable is thus reinforced not only by a mighty acceleration of those changes but also by the widespread public recognition of its justice.

5. The Position of Foreign Countries.

It is likewise relevant to the process of making judgments under the Fourteenth Amendment to inquire how other countries have handled the problem before the Court, for the experience and judgment of other peoples and other governments entitled to respect offers some indication of the direction of reason and justice.

Of the European countries about which information has been found, as of 1939, all had adopted some form of the benefit principle. In most cases no statute laid down the precise method of apportionment, but the following summary of laws and practice is submitted.

Great Britain.

In Great Britain an arbitrary allocation is not sanctioned; instead "it is understood that the railway share is limited to the capitalized equivalent of the savings expected to accrue from the elimination of gatemen, crossing keepers, and so forth."[78] These, of course, are the principal elements usually considered in determining "benefits" to the railroad in crossing elimination cases in this country.

[78] This and subsequent statements regarding the law and practice in European countries are taken from 70 Railway Gazette (London, March 10, 1939), pp. 400, 411-12.

France.

The proportions of the cost of grade crossing elimination borne by the railroad and the public have varied somewhat from time to time. "The railway share has varied between the capitalization of the amount saved through the elimination of the crossing (such savings being principally the crossing-keeper's wages) and double this amount."

Germany.

The method of apportioning grade separation costs in Germany was established by a law passed in 1930 which provided (1) that when the work was carried out to meet the requirements of the railroad, it must bear the cost and (2) when the construction was necessary to meet the needs of road transport, the authority which constructed the road must bear the cost. In both cases, however, "the party which did not ask for the work to be done is called upon to contribute to the cost a sum equal to the financial benefits derived from such work."

Switzerland.

In Switzerland the law requires the railways to take such measures, in respect of grade crossings, as are necessary to ensure the public safety. In practice, the railroads, as in Germany, bear the whole cost if the grade separation is constructed for the convenience of the railroad; but if the project is instituted in the interest of road improvement, the railroad is required to bear only "an amount representing the capitalization of the current expenditure on account of crossing-keeper's wages and other similar items."

Neither logic, nor reason, nor experience nor public policy supports the action of the California Public Utilities Com-

mission in these cases. The competition between highway-rail transportation has increased beyond anything the Commission could well have imagined when it decided, in 1933, that such competition, then in its incipiency, required that costs be allocated on the basis of benefits.[74] The legislature passed no new law requiring a return to an arbitrary allocation policy; no change in public or expert opinion can be relied upon in justification. The fact is that the Commission, for reasons never disclosed, has imposed upon the railroads the burden of the particular item of highway expense here involved, even though the benefits to be derived from the new construction flow almost entirely to users of the highways, of whom a great and growing number are in direct competition with the railroads. This action, we submit, takes appellants' property for public use without just compensation, contrary to the requirements of the Fourteenth Amendment.

II.

THE ARBITRARY ALLOCATION OF GRADE SEPARATION COSTS AGAINST THE RAILROADS CONSTITUTES AN UNDUE BURDEN ON INTERSTATE COMMERCE AND CONTRAVENES THE NATIONAL TRANSPORTATION POLICY.

It is not disputed that both the Santa Fe and the Southern Pacific are interstate common carriers, and that the interstate main lines of both railroads are involved in the two grade separations here in issue. The Washington Boulevard separation involves "one of Santa Fe's main lines to the East" (AR. 3), and "the coast and valley lines

[74] The Commission stated in 1933: "The tremendous changes in transportation conditions make necessary a reappraisement of the liabilities of the two parties at interest. * * * *The use of the highway has become in large measure directly competitive with the rail line.*" *Application of the Department of Public Works* (Decision No. 25551), 38 C. R. C. 380, 386 (1933). See text at footnote 60, *supra*.

of the [Southern Pacific] railroad operate over Los Feliz" (SR. App. 114). The question is thus presented whether a state commission order directing the construction or reconstruction of a railroad-highway grade separation constitutes an undue and unreasonable burden on interstate commerce when the effect of the order is to require an interstate carrier to bear the burden (in excess of its benefits) of "advancing the public convenience" through the construction of a local public improvement. Furthermore, since the chief beneficiaries of the new construction are highway vehicles, the question is also raised whether such preferment of one form of transportation over another is contrary to the National Transportation Policy enunciated by Congress, 54 Stat. 899 (1940).

Recent decisions of this Court have reaffirmed the long standing principle:

> "* * * that the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States. In short, the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States." *Freeman* v. *Hewit*, 329 U. S. 249, 252 (1946).

This Court further pointed out that the reach of the Commerce Clause is not limited to protection against state action which discriminates against interstate commerce but includes as well "any action which may fairly be deemed to have the effect of impeding the free flow of trade between States." *Ibid.* Nor can a state "avoid the operation of this rule by simply invoking the convenient apologetics of the police power." Justice Holmes, speaking for the Court in *Kansas City Southern Ry. Co.* v. *Kaw Valley Drainage District*, 233 U. S. 75, 79 (1914).

Again, as in the case of questions arising under the Four-

teenth Amendment, there is no mechanical formula by which the line may be drawn between state action that unlawfully impedes interstate commerce and action only incidentally affecting that commerce and therefore permissible. However, in a number of cases this Court has emphasized the fact that local regulation of interstate railroads which hinders or prevents the economical and efficient operation of the railroad violates the Commerce Clause. Accordingly, statutes or orders requiring frequent and unnecessary train stops have been held invalid, *St. Louis-San Francisco R. Co.* v. *Public Service Commission*, 261 U. S. 369 (1923); *Chicago, B. & Q. R. Co.* v. *Railroad Commission*, 237 U. S. 220 (1915); *Herndon* v. *Chicago, R. I. & P. R. Co.*, 218 U. S. 135 (1910), and various kinds of orders and statutes purportedly to advance the interests of safety or local public policy have been struck down, *Morgan* v. *Virginia*, 328 U. S. 373 (1946); *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761 (1945); *Kansas City S. R. Co.* v. *Kaw Valley Drainage District*, 233 U. S. 75 (1914).[13]

But perhaps most important, in determining whether the orders here involved constitute an undue burden on interstate commerce, is the fact that they interpose a substantial obstruction to the national transportation policy proclaimed by Congress. Cf. *Southern Pacific Company* v. *Arizona, supra*, p. 773. That statement of policy, which is the basis upon which the nation's transportation system must be developed, reads in pertinent part as follows:

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and im-

[13] The *Kaw Valley* case is particularly apposite since it involved an order to remove certain railroad bridges over a river as an alternative to raising them. This Court, in an opinion by Mr. Justice Holmes, held the order violative of the Commerce Clause, on the ground that the dominant requirements of commerce with other states exceeded the local welfare to be served by destruction of the bridges.

> partial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers; * * * all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense."[76]

That policy is flouted in two important respects by the Commission's orders; first, because they adversely affect the efficiency and economy of rail transportation service; and second, because they result in preferment of one form of transportation over another.

A. The Effect of the Orders Upon the Efficiency and Economy of Rail Transportation Service.

In *Southern Pacific Company* v. *Arizona, supra*, this Court considered at length the question whether the state statute there involved (a train length law) imposed an undue burden upon interstate commerce. Mr. Chief Justice Stone, speaking for the Court, placed particular and repeated emphasis upon the fact that the statute had an adverse effect upon the efficient and economical operation of the railroad, contrary to the national transportation policy, and concluded the Court's opinion by saying:

> "Here examination of all the relevant factors makes it plain that the state interest is outweighed by the interest of the nation in an adequate, economical and efficient railway transportation service, which must prevail." 325 U. S. at 783-84.

It need hardly be argued that the railroads continue to

[76] 54 Stat. 899, 49 U. S. C. preceding § 1.

supply an essential transportation service, and that the national interest requires that they be preserved in full vigor. The facts demonstrate, we submit, that the imposition upon the railroads of the costs of constructing what are, in reality, public highway improvements will have a substantial adverse effect upon that national interest.

It should be emphasized that the two grade separations here involved are not isolated projects which, once constructed, will end the grade crossing elimination responsibilities of appellants in California or elsewhere. On the contrary, the present separation projects, although highly important, are merely steps in a tremendous statewide and nationwide program. The magnitude of that program and its disastrous effect upon the railroads if they must pay all, or a high arbitrary percentage, of the costs should be made clear to this Court. While nationwide figures are not available, the following indicates the extent of the grade separation program in California.

Upon the request of the Joint Fact-Finding Committee on Highways of the California Legislature, the Automotive Safety Foundation, in cooperation with the Division of Highways, U. S. Bureau of Public Roads, prepared a study of improvements required to serve present and future travel on the California state highways.[77] In this comprehensive study, which was intended to be an "analysis of needed improvements to the State Highway System upon which a sound program for the system's development can be based,"[78] it was concluded that the program should include 273 new railroad separation structures and reconstruction of 21 existing separations, a total of 294 separation proj-

[77] *California State Highways*, An Engineering Study of Improvements Required to Serve Present and Future Travel, prepared for Joint Fact-Finding Committee on Highways, California Legislature (1952).

[78] *Id.*, letter of transmittal.

ects! And of this total, 131 are considered to be needed immediately.[79]

These figures, it should be noted, include *only* separations required on the state highway system and do not include separations on county roads or city streets, as to which more will be said. The impact of this program upon the railroads if they are forced to bear an arbitrary share of the cost far in excess of any benefits therefrom will be readily understood. Of the 294 separations mentioned above, for example, the Southern Pacific is involved in 161, the locations of which are marked on the map attached hereto as Appendix B. Taking the average of the costs to be incurred in the two separation projects here involved ($1,031,277), not necessarily as representative of future projects but as suggestive of the possibilities, and assuming that the Commission continues its present policy of assessing 50% of those costs against the railroad, the Southern Pacific thus faces an exaction of over $83,000,000 for grade separation construction on the state highways of California alone. Moreover, an acknowledged power in the State to make purely arbitrary allocations, regardless of benefits received, would, of course, include the power to impose the whole cost upon the railroad, and it cannot be doubted that there would be proponents for that point of view.

But even such a staggering potential liability does not tell the whole story. In addition to separations on the state highway system, plans have been made to separate crossings on many city streets and county roads not a part of that system. For example, on January 5, 1951, a sub-committee of the Los Angeles County Grade Crossing Committee, made up of representatives of the County, the Cities of Los Angeles and Burbank, the Automobile Club of Southern California and several railroads, submitted a

[79] *Id.* at p. 53.

list of no less than 157 crossings *within the County of Los Angeles* for which it recommended construction or reconstruction of grade separations.[50] A map indicating the recommended projects, which was prepared by the Committee, is attached hereto as Appendix C. The certainty that the construction of many new separations will be demanded in the immediate future is demonstrated by the fact that the Washington Boulevard and Los Feliz separations, although characterized by the Commission and the cities as having "high priority" (AR. 16-18, 32, 141-142; SR. 123, 160), are actually only the tenth and eighteenth on the list, respectively.

It is thus apparent that, if the railroads are forced to bear the burden of constructing these highway improvements whatever their benefits from such construction, they face economic burdens which simply cannot be met. The competitive situation is such that the costs of such projects, which result in greater expenses for railroads and lower expenses for trucks and buses, cannot be passed on in the form of higher rates (AR. 30). As this Court recognized in *King* v. *United States*, 344 U. S. 254, 262 (1952), one of the pressing problems in furthering the national transportation policy is

> "the growth of vigorous competition from automobiles and other forms of transportation which made it futile to compensate for the passenger deficits by increasing passenger rates."

Whatever may have been true in years past, appellants cannot maintain the standard of service which they have established if the funds which would otherwise be spent for equipment, maintenance, wages and railroad operations must be spent on improving the right of way of their com-

[50] Of this number, 41 represented separations in the City of Pasadena, as to which the committee recommended that the Public Utilities Commission make a further study.

petitors. The nation's railroads have been held to "substandard" rates of return as a result of rising costs. *Ex parte* 175, 284 I. C. C. 589, 612 (1952). This condition has caused a congressional committee recently to express concern over the "precarious financial position" of the railroads.[81] Under these circumstances, as in *Southern Pacific Company* v. *Arizona, supra*, it is plain that "the state interest is outweighed by the interest of the nation in an adequate, economical and efficient railway transportation service, which must prevail." 325 U. S. at 783-784.

B. The Effect of the Orders as Preferment of Highway Over Rail Transportation.

The national transportation policy not only enjoins the promotion of adequate, economical and efficient transportation service but also declares that no one form of transportation shall be preferred over the other. Cf. *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, 576-577 (1947). Here the State of California has done precisely that.

As has been indicated, the purpose of the new construction authorized by the Commission's orders is not to remove an accident hazard, which is completely absent in one case and *de minimis* in the other, but to speed the flow of trucks, buses and automobiles across the railroad. In the *Southern Pacific* case, for example, it has been determined that construction of the separation, by eliminating that delay, will save motor vehicle operators $57,362 a year (SR. App. 87-88). Yet despite these *admitted* benefits to highway transportation (as against a yearly benefit of $5,917 to the railroad) the State has assessed a full 50% of the costs of the improvement against the latter.

Such discrimination constitutes a clear preferment of

[81] S. Rep. No. 1039, 82nd Cong. 1st Sess. (1951), p. 46.

users of the highway over rail carriers contrary to the program and policy of the Congress. Congress itself set the federal standard in 1944 when it adopted the benefit principle with respect to grade separations constructed on federal-aid highways. See p. 62, *supra*. If each form of transportation pays according to the benefits it receives from the construction, no one loses, no one is preferred. But to impose a high arbitrary percentage of the total cost upon one form of transportation even though its benefits are small and those of the other are large is to violate the very rule of equality of treatment which the statement of national transportation policy was designed to implement.

III.

THE STATUTORY JURISDICTION OF THIS COURT.

The orders of this Court entered in these cases on May 18, 1953 (AR. 259; SR. 294) postponed the question of jurisdiction to the hearing of the cases on the merits. In their Statements as to Jurisdiction, appellants took the position that the orders of the Commission entered in these cases were state "statutes" within the meaning of Title 28 U. S. C. Section 1257 (2) and that this Court's jurisdiction to review the federal questions presented was properly invoked by appeal.

In motions to dismiss or affirm filed by the Cities of Los Angeles and Glendale as "real parties in interest," the contention was made that "the validity of a state statute is not involved in these appeals" because appellants' principal challenges are directed to the conditions in the Commission's orders which specify the cost allocations, and not to the orders as a whole; that those "portions of the orders are not legislative in character and are not statutes of the state within the meaning of Section 1257 (2)

of Title 28 of the U. S. Code," but are instead "judicial determinations under the organic law of California."

It should be noted at the outset that this contention does not affect this Court's jurisdiction to hear and decide the federal questions presented, but raises only the issue whether, under the particular circumstances here presented, review by certiorari rather than by appeal is proper. Even if it were to be assumed that the certiorari route should have been followed, the Court would treat the appeal papers in these cases as petitions for writs of certiorari. Title 28 U. S. C., Section 2103. Since arguments and briefs on the merits are being received and considered, this Court's determination of this jurisdictional question will not affect its ruling on the constitutional questions presented.

The California Commission, whose orders are here challenged, has never made or joined in the contention now made by the cities. It has never agreed that its orders in grade-separation cases are severable, or particularly that the portion of an order authorizing or directing construction of such a project is independent and separate from the portion allocating the costs of the construction. On the contrary, the Commission strongly contends, as pointed out in its opinions "that the authority of this Commission to allocate costs stems primarily from Section 1202 of the Public Utilities Code and is an exercise of the police power on the part of the State of California * * *" (SR. App. 32; AR. 128).

Section 1202 of the California Public Utilities Code, provides in part that the Commission has power:

> "(c) To require, where in its judgment it would be practicable, a separation of grades at any such crossing heretofore or hereafter established and to prescribe the terms upon which such separation shall be made and the proportions in which the expense

> of the * * * separation of such grades shall be divided between the railroad * * * and the State, county, city, or other political subdivision affected." (AR. 128).

The cities would apparently have this Court hold that the Commission acts legislatively under the first clause of Section 1202(c), but assumes the role of a judicial body under the subsequent clause of the same section; that certain portions of its order represent the exercise of legislative power, while some of the "conditions" of that exercise of power represent concurrent judicial determinations by the same body.

There are a number of fallacies in this position, both logical and practical. The distinction between legislative and judicial action was pointed out by Mr. Justice Holmes, speaking for this Court in *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 226 (1908), as follows:

> "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power."

The allocation of costs in these cases can hardly be considered a declaration or enforcement of liabilities "under laws supposed already to exist," since the "liability" arises out of the very order which makes the allocation.

Just as the rate-making process was considered to be of legislative character in the *Prentis* case, the assessment of a charge against appellants for future construction "looks to the future and changes existing conditions." The fact that each order fixed an allocation of costs for only a single project is of no moment; the same is true of that part of the order directing the construction, which the cities recognize to be legislative in character.

It has been fundamental to the Commission's position throughout these proceedings that the allocation of costs, quite as much as the direction to build the separation, represents an exercise of the police power (AR. 128; SR. App. 32). It is precisely on that ground that both the Commission *and the cities* contend that the Commission is not bound to allocate the costs on the basis of benefits received. This Court has consistently held that the exercise of the police power is exclusively a legislative function. *Phillips* v. *Mobile*, 208 U. S. 472, 479 (1907); *Lawton* v. *Steele*, 152 U. S. 133, 136 (1894). In California it is also well-settled, as a matter of state law, that the exercise of the police power is purely legislative in character. *Curtis* v. *Los Angeles*, 172 Cal. 230, 234, 156 Pac. 462, 464 (1916); *Frost* v. *Los Angeles*, 181 Cal. 22, 28, 183 Pac. 342, 345 (1919).

As a practical matter, the portion of the order allocating costs cannot be severed from the portion directing construction of the separation. Each is essential to the other, and each would be wholly ineffective in the absence of the other. In each case the text of the order itself declares that the authority and direction for construction are subject to the condition, among others, that 50% of the "total cost shall be borne by" the railroad company concerned. No extended argument is necessary to demonstrate that these orders for the building of large and expensive structures would be of no effect whatever if they did not include due provisions for the raising of the necessary funds. The allocation provisions fulfill that indispensable requirement.

Finally, this Court has heretofore considered the precise question here presented and has held that the portion of a state commission order allocating costs of constructing a grade crossing facility represents a *legislative* act. In *Grand Trunk Western Ry. Co.* v. *Railroad Commission*,

221 U. S. 400 (1911), a state commission apportioned costs of constructing certain grade crossing protective devices between two railroads, whereupon one railroad brought suit to annul the order on the ground that the other was bound by contract to bear the entire expense. No question was raised as to the commission's authority to order installation of the devices; the sole question presented was whether the commission's allocation of costs impaired the obligation of the contract between the two railroads, contrary to the provisions of the federal Constitution. The very question here raised by the appellee cities was answered by this Court as follows:

> "Observing first, that the order is a legislative act by an instrumentality of the state exercising delegated authority (*Prentis* v. *Atlantic Coast Line R. Co.*, 211 U. S. 210, 226), is of the same force as made by the legislature, *and so is a law of the state* within the meaning of the contract clause of the Constitution [citations], we come to consider whether it does impair the obligation of the contract." 221 U. S. at 403.

See also, *Lake Erie & Western R. Co.* v. *Illinois Public Utilities Commission*, 249 U. S. 422 (1919); *Chicago & North Western R. Co.* v. *Ochs*, 249 U. S. 416 (1919); *Atchison, T. & S. F. Ry. Co.* v. *Railroad Commission*, 283 U. S. 380 (1931).

We respectfully submit that the contention made by the Cities of Los Angeles and Glendale is insubstantial. While appellants have challenged only the Commission's assessments of costs, they have always contended that such arbitrary assessments vitiate the Commission's orders in their entirety (AR. 3-5, 9, 256-257; SR. 7-9, 38-39, 290-292). The Commission's orders clearly represent the exercise of legislative authority and are thus state "statutes" within the meaning of Title 28 U. S. C. Section 1257(2). But whatever the Court's decision as to whether appeal or certiorari is the proper jurisdictional route, the ques-

tions presented are properly before the Court by reason of the provisions of Title 28 U. S. C. Section 2103, and this Court's decision on the merits is therefore justified and required.

CONCLUSION.

The judgments of the Supreme Court of California entered in these cases should be reversed.

Respectfully submitted,

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Table 1

MOTOR-VEHICLE REGISTRATION IN THE UNITED STATES, 1900-1951

(Does not include publicly owned vehicles)

Year	Automobiles	Busses	Trucks	Total
1900	8,000			8,000
1901	14,800			14,800
1902	23,000			23,000
1903	32,920			32,920
1904	54,590		700	55,290
1905	77,400		1,400	78,800
1906	105,900		2,200	108,100
1907	140,300		2,900	143,200
1908	194,400		4,000	198,400
1909	305,950		6,050	312,000
1910	458,377		10,123	468,500
1911	618,727		20,773	639,500
1912	901,596		42,404	944,000
1913	1,190,393		67,667	1,258,060
1914	1,664,003		99,015	1,763,018
1915	2,332,426		158,506	2,490,932
1916	3,367,889		250,048	3,617,937
1917	4,727,468		391,057	5,118,525
1918	5,554,952		605,496	6,160,448
1919	6,679,133		897,755	7,576,888
1920	8,131,522		1,107,639	9,239,161
1921	9,212,158		1,281,508	10,493,666
1922	10,704,076		1,569,523	12,273,599
1923	13,253,019		1,849,086	15,102,105
1924	15,436,102		2,176,838	17,612,940
1925	17,439,701	17,808	2,483,215	19,940,724
1926	19,220,885	24,320	2,807,354	22,052,559
1927	20,142,120	27,659	2,969,780	23,139,559
1928	21,308,159	31,982	3,171,542	24,511,683
1929	23,060,421	33,999	3,408,088	26,502,508
1930	22,972,745	40,507	3,518,747	26,531,999
1931	22,330,402	41,880	3,489,756	25,862,038
1932	20,832,357	43,476	3,256,776	24,132,609
1933	20,586,284	44,918	3,245,505	23,876,707
1934	21,472,078	51,530	3,430,396	24,954,004
1935	22,494,884	58,994	3,675,865	26,229,743
1936	24,108,236	62,618	4,001,464	28,172,318
1937	25,390,773	66,166	4,249,219	29,706,158
1938	25,167,030	65,198	4,210,477	29,442,705
1939	26,139,526	68,859	4,406,702	30,615,087
1940	27,372,397	72,641	4,590,386	32,035,424
1941	29,524,101	88,800	4,859,244	34,472,145
1942	27,868,746	102,093	4,608,086	32,578,925
1943	25,912,730	106,702	4,480,176	30,499,608
1944	25,466,331	106,518	4,513,340	30,086,189
1945	25,691,434	112,253	4,834,742	30,638,429
1946	28,100,188	119,937	5,725,692	33,945,817
1947	30,718,852	128,983	6,512,628	37,360,463
1948	33,248,878	133,372	7,225,706	40,607,956
1949	36,292,703	134,971	7,692,569	44,120,243
1950	40,185,146	143,206	8,238,632	48,566,984
1951	42,525,217	143,290	8,623,090	51,291,597

Source: 1900-1949 U. S. Bureau of Public Roads, A Factual Discussion of Motor-truck Operation, Regulation, and Taxation (1951).

1950-1951 U. S. Bureau of Public Roads, Highway Statistics, 1950, p. 16; Highway Statistics, 1951, p. 12.

Table 2

CARRIED LOAD IN TON-MILES BY TRUCKS AND COMBINATIONS ON MAIN RURAL ROADS, 1936, 1940-1946

(in millions of ton-miles)

Year	Ton-Miles
1936	28,005
1940	46,247
1941	58,737
1942	45,704
1943	43,876
1944	44,696
1945	50,364
1946	60,892
1947	73,610
1948	83,119
1949	89,099
1950	121,091
1951	126,402

Source: 1936-1946 Bureau of Public Roads, Highway Statistics, Summary to 1945, p. 33.

1947-1951 Bureau of Public Roads, Highway Statistics, 1947, p. 20; Highway Statistics, 1948, p. 35; Highway Statistics, 1949, p. 32; Highway Statistics, 1950, p. 38; Highway Statistics, 1951, p. 28.

Table 3

EXISTING RURAL HIGHWAY MILEAGE IN THE UNITED STATES

Year	Total Mileage	Total Surfaced	Total Unsurfaced
1904		153,530	
1905		160,919	
1906		168,308	
1907		175,697	
1908		183,086	
1909		190,476	
1910		203,839	
1911		217,202	
1912		230,566	
1913		243,929	
1914		257,292	
1915		275,930	
1916		294,569	
1917		313,207	
1918		331,845	
1919		350,484	
1920		369,122	
1921	2,925,000	387,000	2,538,000
1922	2,960,000	412,000	2,548,000
1923	2,996,000	439,000	2,557,000
1924	3,004,000	472,000	2,532,000
1925	3,006,000	521,000	2,485,000
1926	3,000,000	550,000	2,450,000
1927	3,013,000	589,000	2,424,000
1928	3,016,000	626,000	2,390,000
1929	3,024,000	662,000	2,362,000
1930	3,009,000	694,000	2,315,000
1931	3,036,000	830,000	2,206,000
1932	3,040,000	879,000	2,161,000
1933	3,029,000	914,000	2,115,000
1934	3,034,000	977,000	2,057,000
1935	3,032,000	1,063,000	1,969,000
1936	2,987,000	1,157,000	1,830,000
1937	2,960,000	1,210,000	1,750,000
1938	2,968,000	1,253,000	1,715,000
1939	2,980,000	1,292,000	1,688,000
1940	2,990,000	1,340,000	1,650,000
1941	3,005,000	1,384,000	1,621,000
1942	3,004,000	1,406,000	1,598,000
1943	3,005,000	1,421,000	1,584,000
1944	3,005,000	1,430,000	1,575,000
1945	3,012,000	1,495,000	1,517,000
1946	3,009,145	1,503,846	1,505,212
1947	3,010,000	1,544,000	1,466,000
1948	3,007,000	1,574,000	1,433,000
1949	3,002,509	1,616,557	1,385,952
1950	2,990,000	1,679,000	1,311,000
1951	2,987,430	1,723,175	1,264,255

Source: 1904-1920 Historical Statistics of the United States, 1789-1945, U. S. Department of Commerce, Bureau of the Census, columns 175 and 182, p. 220.

1921-1945 Bureau of Public Roads, Highway Statistics, Summary to 1945, p. 60.

1946-1951 Bureau of Public Roads, Highway Statistics, 1946, p. 102; Highway Statistics, 1947, p. 111; Highway Statistics, 1948, p. 96; Highway Statistics, 1949, p. 125; Highway Statistics, 1951, p. 103. (1950, sheet M-2, issued December, 1951.)

Table 4

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

GROSS OPERATING REVENUE-TRANSPORTATION OF PROPERTY*

BY CLASSES OF CARRIERS

Year	Steam Railroads		Highway Carriers (Common and Permitted)	
	Amount	Percent	Amount	Percent
1938	$ 32,000,204	27.8	$ 76,507,978	65.9
1939	34,097,248	28.5	78,493,324	65.6
1940	34,994,956	28.5	80,250,836	65.3
1941	43,177,632	27.5	104,832,844	66.8
1942	53,385,460	28.4	124,377,448	66.1
1943	61,535,960	28.3	144,159,632	66.4
1944	66,932,112	27.5	162,862,396	66.9
1945	66,928,720	25.6	180,303,860	68.9
1946	61,366,632	20.9	218,086,064	74.1
1947	75,109,064	22.1	246,883,044	72.8
1948	84,912,848	23.1	261,227,533	71.2
1949	73,923,026	20.9	260,590,524	73.7
1950	84,593,858	20.9	300,026,475	74.0
1951	89,239,569	19.3	351,327,716	75.7

*Based on fees collected under the Transportation Rate Fund Act.

Source: Final report of the California Senate interim committee on Regulation of Highway Carriers (1953), p. 45.

Table 5

COMPARISON OF FREIGHT REVENUES OF INTERCITY MOTOR CARRIERS AND RAILROADS OF ALL CLASSES

(revenues in millions of dollars)

Year	Freight Revenue-Intercity Motor Carriers Reporting to I.C.C.	Freight Revenue-Railroads of All Classes	Per Cent Motor Carrier Freight Revenue to Railroad Freight Revenue
	(1)	(2)	(3)
1939	$ 792.2	$ 3,297.1	24.0%
1940	867.0	3,584.2	24.2
1941	1,095.7	4,509.8	24.3
1942	1,212.7	6,026.4	20.1
1943	1,304.7	6,865.8	19.0
1944	1,351.9	7,087.0	19.1
1945	1,406.3	6,617.2	21.3
1946	1,654.5	5,866.4	28.2
1947	2,213.6	7,140.9	31.0
1948	2,698.1	8,090.2	33.4
1949	2,911.2	7,151.2	40.7
1950	3,737.1	7,933.8	47.1

Source: Column 1 I.C.C. Bureau of Transport Economics and Statistics, Statement No. 531, Table 1, p. 4.

Column 2 I.C.C. Statistics of Railways in the United States (1950), Table 155, p. 158.

Column 3 Computed.

Table 6

INTERCITY PASSENGER-MILES BY RAILROAD AND HIGHWAY

(Figures in millions of passenger-miles)

Year	Private Automobiles	Railroads*	Intercity Busses**
1929	154,300	24,200	6,800
1930	160,900	20,200	7,100
1931	168,600	15,900	6,700
1932	156,400	12,000	6,300
1933	156,500	12,000	6,400
1934	168,100	13,900	7,100
1935	178,300	14,400	7,600
1936	197,400	18,200	9,200
1937	228,400	21,500	12,700
1938	226,300	18,700	10,100
1939	234,700	19,600	11,600
1940	245,800	20,800	12,000
1941	264,300	26,500	14,000
1942	199,600	50,300	22,000
1943	147,100	84,600	27,800
1944	151,300	92,200	26,900
1945	179,800	88,100	27,300
1946	253,600	60,400	26,100
1947	273,000	40,800	24,500
1948	287,400	36,000	24,200
1949	316,700	30,500	23,200
1950	337,300	27,500	21,700
1951	362,000	30,600	23,200

*Excludes commutation passenger-miles.

**Estimated passenger-miles of charter travel included, beginning with 1939.

Source: Bus Facts, 21st Edition, page 7, published by National Association of Motor Bus Operators.

Appendix B

(Note:

This road map will be found in various frames below.)

STATE OF CALIFORNIA
DEPARTMENT OF PUBLIC WORKS
DIVISION OF HIGHWAYS

ROAD MAP
of the State of
CALIFORNIA

1952

Statute Miles
0 5 10 20 30 40 50



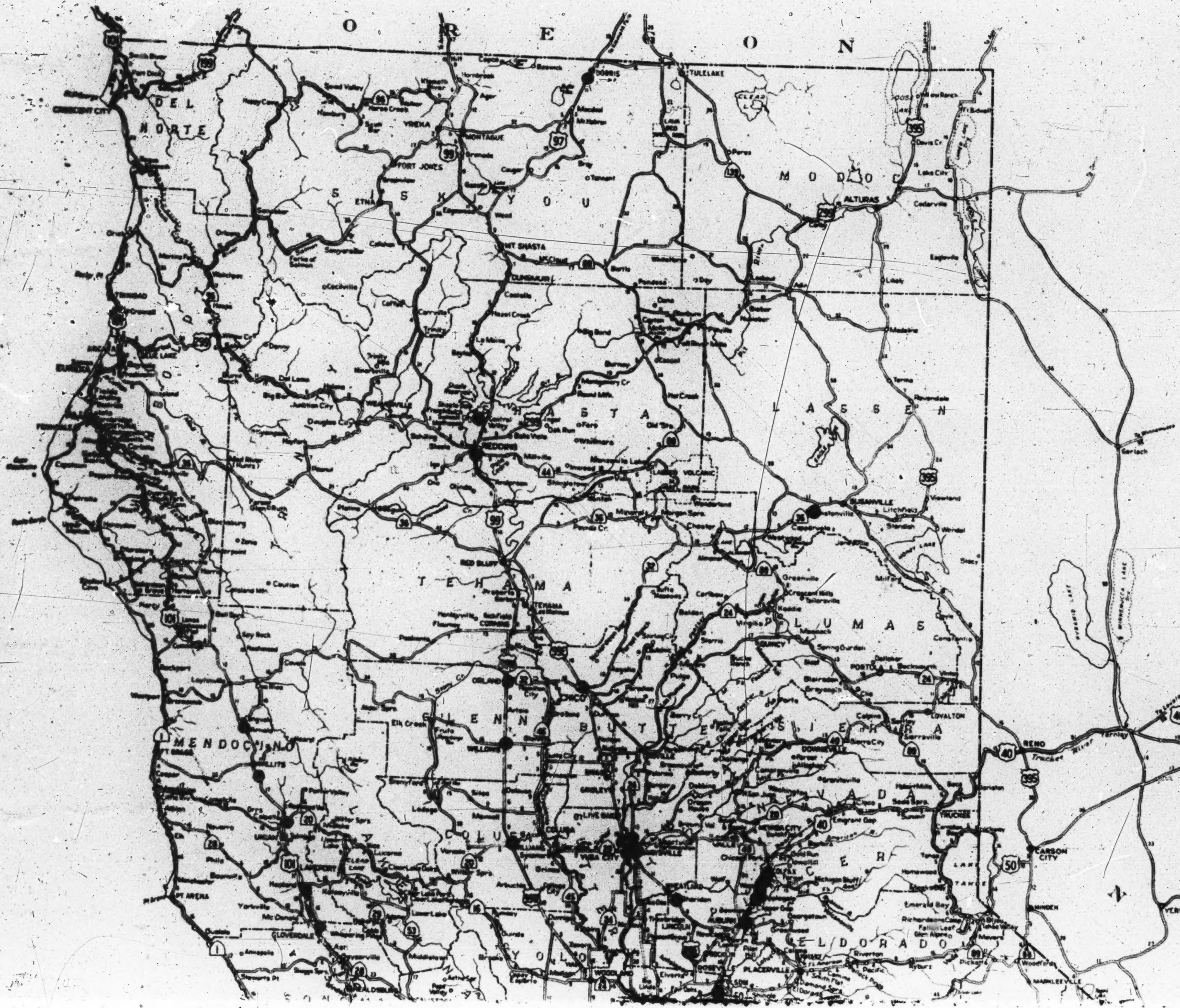
— LEGEND —

- Portland Cement Concrete, Asphalt Concrete or Bituminous Surface
- Oiled Gravel, Gravel or Oiled Earth
- Earth
- Proposed State Highways - Approximate Location
- County Roads and National Park Roads
- Figures denote Mileage between Towns or Intersecting Roads
- 101 U.S. Highway Route Numbers
- 39 California State Highway Sign Numbers
- S.P. Separations (New)
- S.P. Separations (Reconstruct)
- S.P. & Others - Joint Crossing

} Based on A.S.F. Proposals only.

- State Capital
- County Seat Incorporated
- County Seat Not Incorporated
- City or Town Incorporated
- Town Not Incorporated
- State Line
- County Line
- National Monument

Note S.P. Separations include S.P.Co., N.W.P.R.R., P. & S.R., and S.D. & A.E.


O R E G O N
DEL NORTE
SISKIYOU
MODOC
HUMBOLDT
TRINITY
SHASTA
LASSEN
TEHAMA
PLUMAS
MENDOCINO
GLENN
BUTTE
SIERRA
COLUSA
NEVADA
YOLO
EL DORADO
CRESCENT CITY
EUREKA
YREKA
MONTAGUE
FORT JONES
ETNA
WEAVERVILLE
DOYLE
TULELAKE
ALTURAS
MT SHASTA
DUNSMUIR
REDDING
RED BLUFF
CORNING
ORLAND
WILLOWS
WILLITS
UKIAH
FORT BRAGG
POINT ARENA
GUERNEVILLE
SANTA ROSA
CLOVERDALE
WILLITS
LAKEPORT
CLEAR LAKE
LOWER LAKE
CALISTOGA
NAPA
VALLEJO
VACAVILLE
DAVIS
WOODLAND
SUSANVILLE
LITCHFIELD
LOYALTON
PORTOLA
QUINCY
GRANTSVILLE
TRUCKEE
RENO
CARSON CITY
GERLACH
LAKE CITY
DAVIS CR
LEAVITT LAKE
WINNEMUCCA LAKE
EMERALD BAY
PLACERVILLE
MARKLEEVILLE
COLOMA
GEORGETOWN
LAKE TAHOE
VOLCANIC NATIONAL MONUMENT
LASSEN VOLCANIC NATIONAL PARK
YERINGTON
CARSON

STATE OF CALIFORNIA
DEPARTMENT OF PUBLIC WORKS
DIVISION OF HIGHWAYS

ROAD MAP
of the State of
CALIFORNIA

1952

Statute Miles
0 5 10 20 30 40 50

- LEGEND -

- Portland Cement Concrete, Asphalt Concrete or Bituminous Surface
- Oiled Gravel, Gravel or Oiled Earth
- Earth
- Proposed State Highways - Approximate Location
- County Roads and National Park Roads
- Figures denote Mileage between Towns or Intersecting Roads
- 101 U.S. Highway Route Numbers
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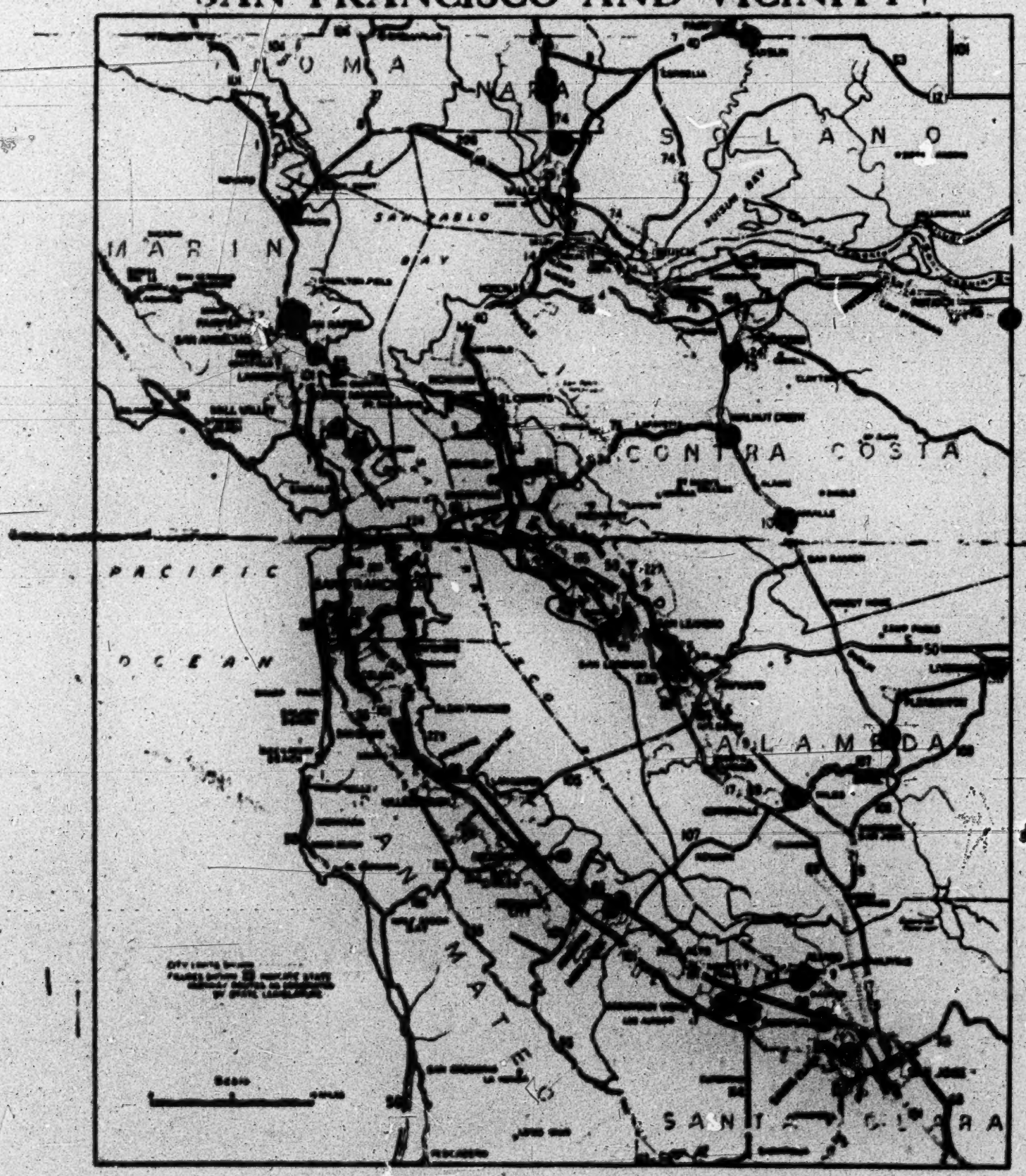
- State Capital
- County Seat Incorporated
- County Seat Not Incorporated
- City or Town Incorporated
- Town Not Incorporated
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- County Line
- National Monument

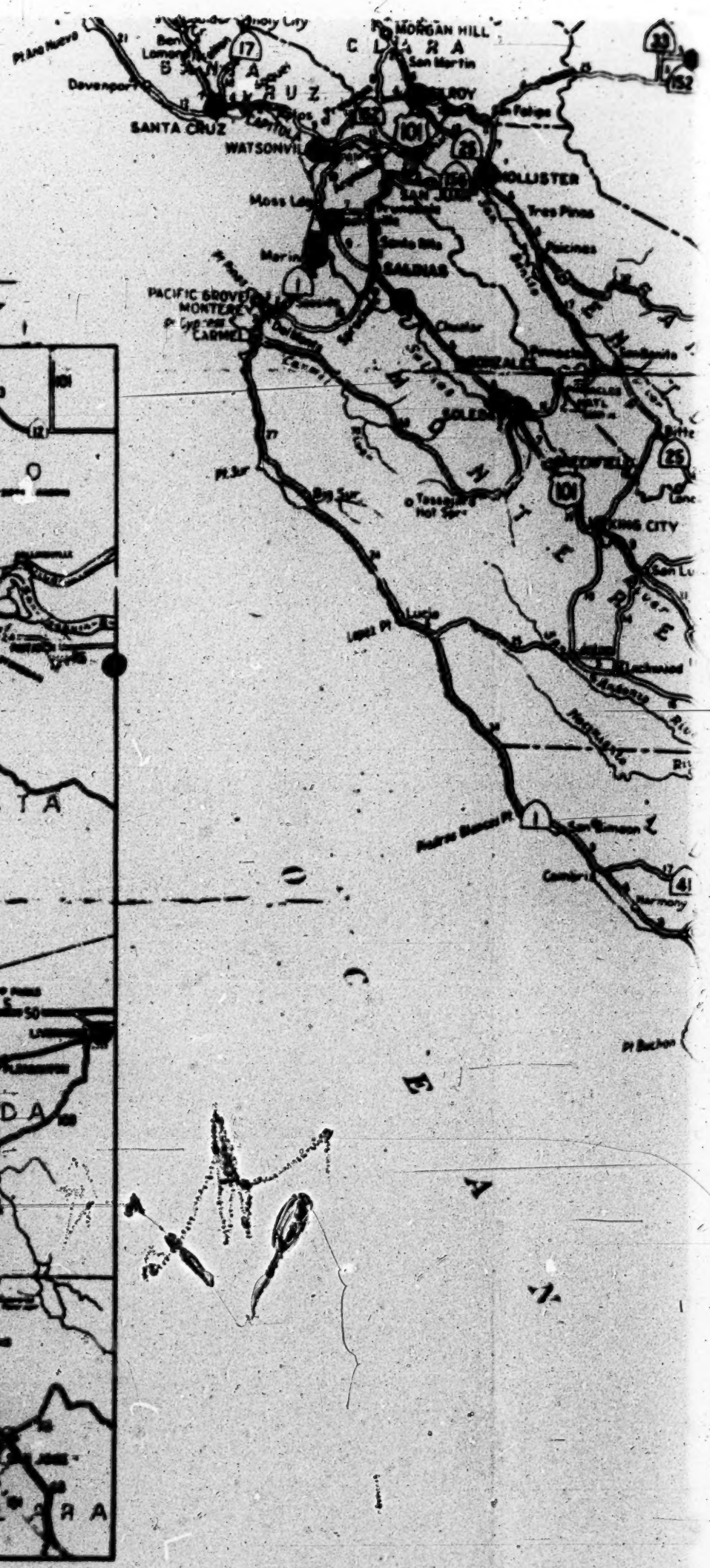
- S.P. Separations (New)
- S.P. Separations (Reconstruct)
- S.P. & Others - Joint Crossing

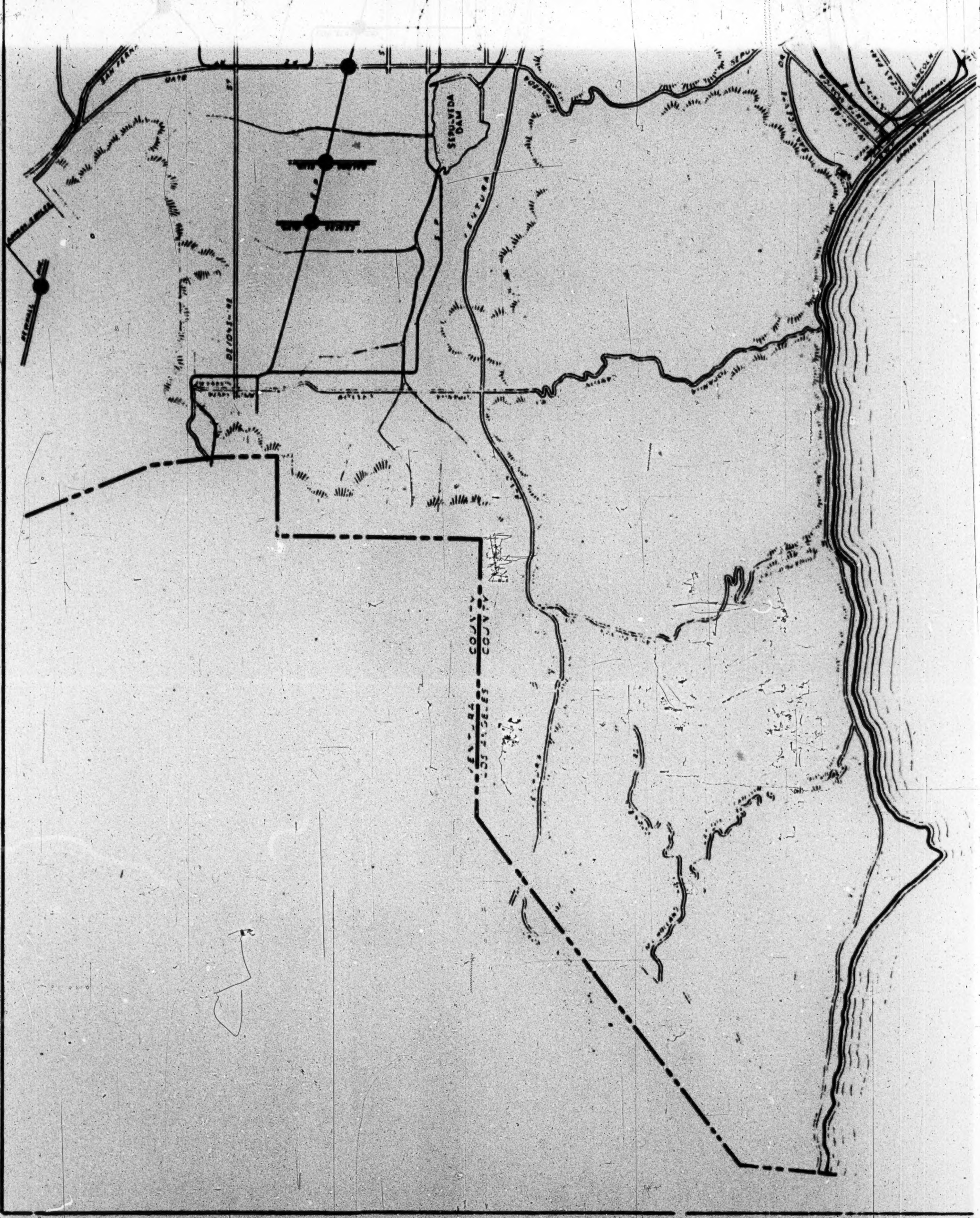
} Based on A.S.F. Proposals only.

Note S.P. Separations include S.P.Co., N.W.P.R.R., P. & S.R., and S.D. & A.E.

SAN FRANCISCO AND VICINITY



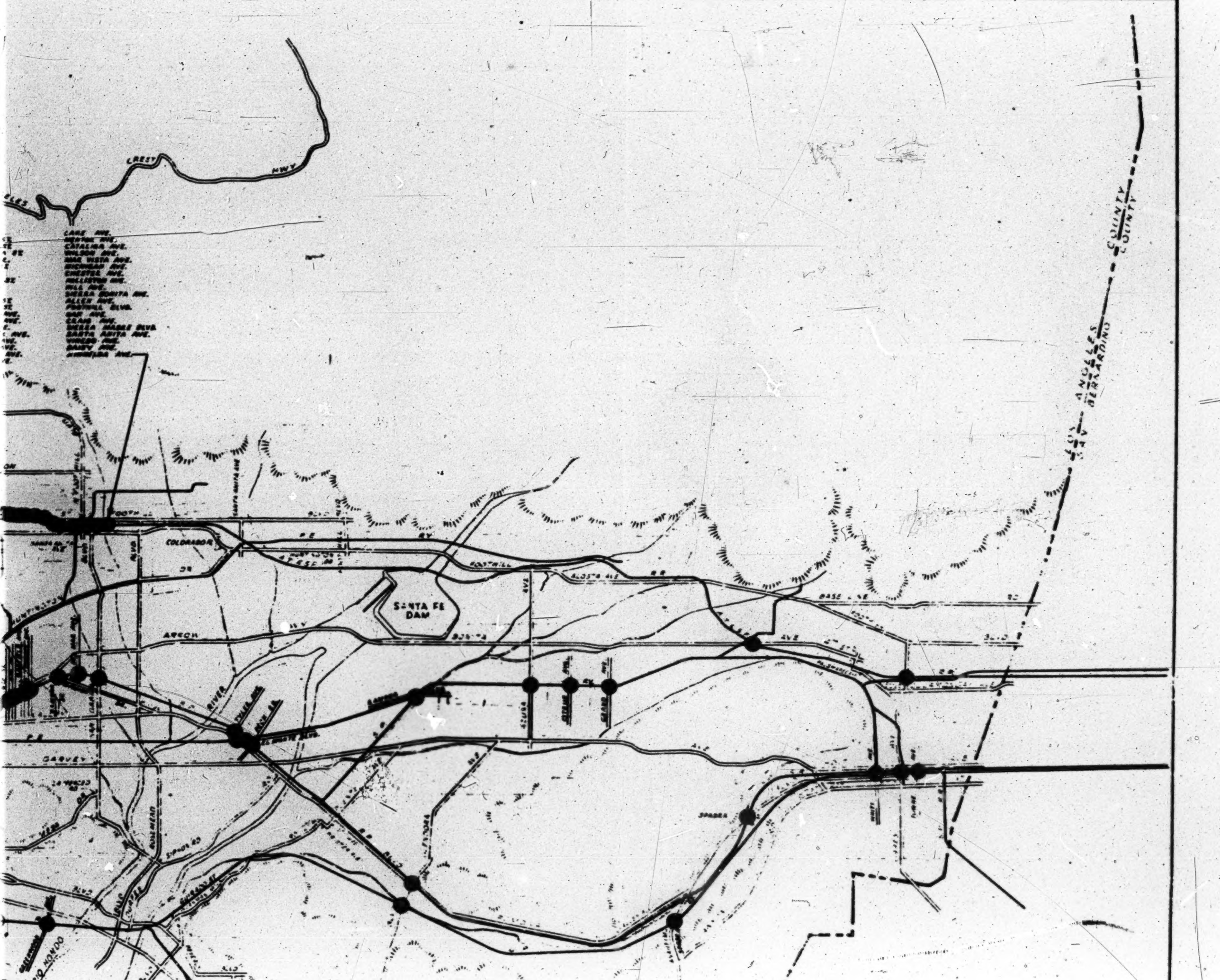



SAN PEDRO
SEPULVEDA BLVD.
PACIFIC OCEAN

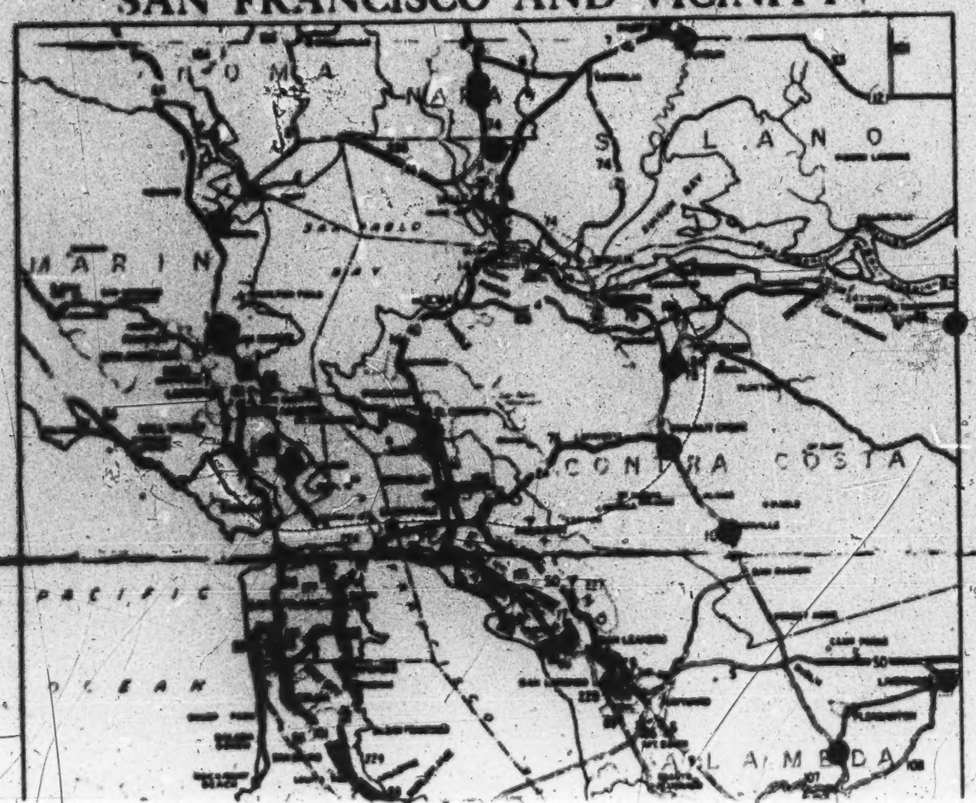
HANSEN DAM

SEPULVEDA DAM

STATE ST	LAKE AVE.
GLENARM ST	ALTADENA AVE.
FILLMORE ST	CATALINA AVE.
CALIFORNIA ST	WILSON AVE.
BELLEVUE DR.	SAN VISTA AVE.
DEL MAR ST	RAMONA AVE.
GREEN ST	CHESTER AVE.
COLORADO ST	HOLLISTER AVE.
UNION ST	HILL AVE.
HOLLY ST	SIERRA BONITA AVE.
WALNUT ST	ALLEN AVE.
CHESTNUT ST	FOOTHILL BLVD.
MACKEWOOD AVE.	OAK AVE.
GARFIELD AVE.	CLARK AVE.
EUCLID AVE.	SIERRA MADRE BLVD.
LOS ROBLES AVE.	SANTA ANITA AVE.
OAKLAND AVE.	VIREDO AVE.
MADISON AVE.	DAISY AVE.
EL MOLINO AVE.	KINNELOA AVE.
HUDSON AVE.	


LOS ANGELES COUNTY
SANTA FE DAM
SANTA ANITA AVE.
FREEWAY
RIVER
COLORADO
ARROYO
GARVEY
SPRING RD.

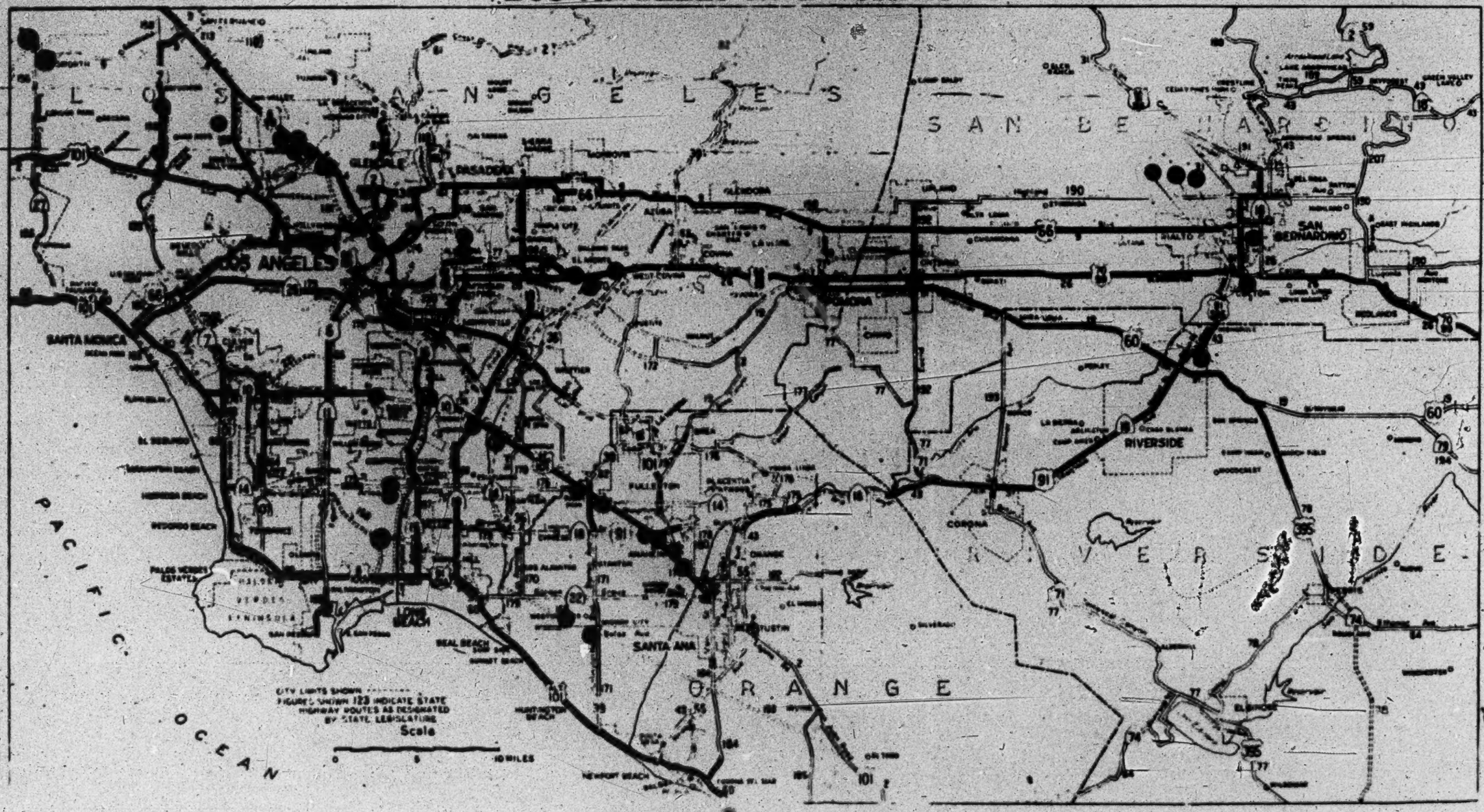
SAN FRANCISCO AND VICINITY




ESMERALDA
NYE
MONO
MONO LAKE
HAWTHORNE
WALKER LAKE
TONOPAH
GOLDFIELD
BEATTY
LAS VEGAS
KINGS CANYON NATIONAL PARK
SEQUOIA NATIONAL PARK
DEATH VALLEY NATIONAL MONUMENT
DEATH VALLEY
INYO
TULARE
KERN
BAKERSFIELD
TEHACHAPI
MOJAVE
WASCO
SHAFTER
DELANO
TAFT
MARICOPA
INDEPENDENCE
LONE PINE
BISHOP
MAMMOTH LAKES
CRESTLINE
LAKE ARROWHEAD
BIG PINE
BIG CREEK
HUNTINGTON LAKE
SHAVER LAKE
PORTERVILLE
LINDSAY
EXETER
VISALIA
TULARE
HANFORD
CORCORAN
KINGSBURG
REEDLEY
SANGER
FRESNO
CLOVIS
SELMA
KINGSBURG
ORANGE COVE
DINUBA
CUTLER
OROSI
PORTERVILLE
TERRA BELLA
DELANO
WASCO
SHAFTER
BAKERSFIELD
ARVIN
LAMONT
WEEDPATCH
TEHACHAPI
MOJAVE
CALIENTE
CUDDEBACK LAKE
CRUCERO
KELSO
BARSTOW
VICTORVILLE
HESPERIA
APPLE VALLEY
LUCERNE VALLEY
YERMO
DAGGETT
NEWBERRY SPRINGS
ESSEX
AMBOY
CADIZ
DANBY
ROUTE 66
ROUTE 395
ROUTE 99
ROUTE 6
ROUTE 95
ROUTE 127
ROUTE 178
ROUTE 466

Appendix C

LOS ANGELES AND VICINITY



GRADE SEPARATION PROGRAM
COUNTY OF LOS ANGELES

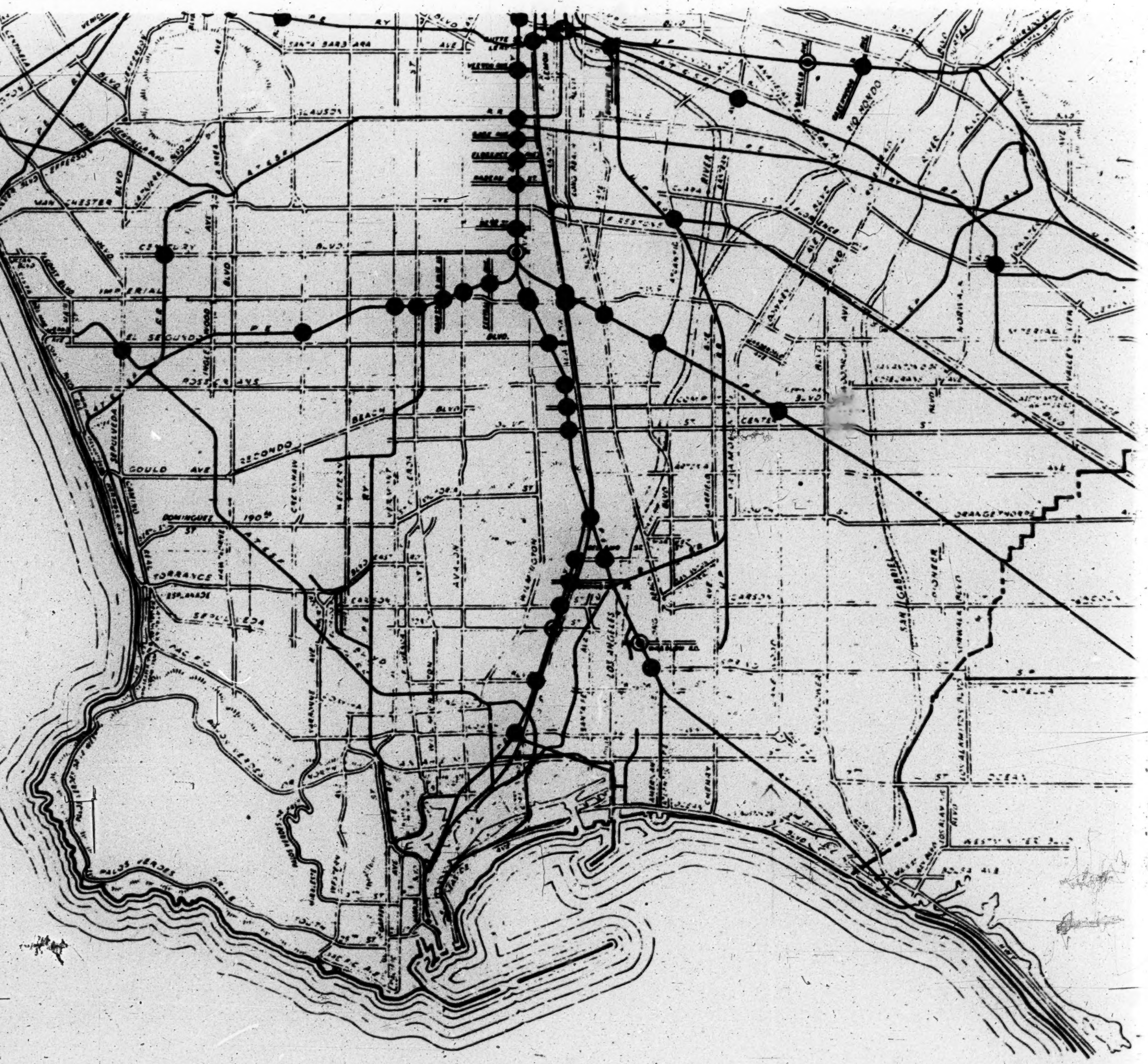
JANUARY 1951

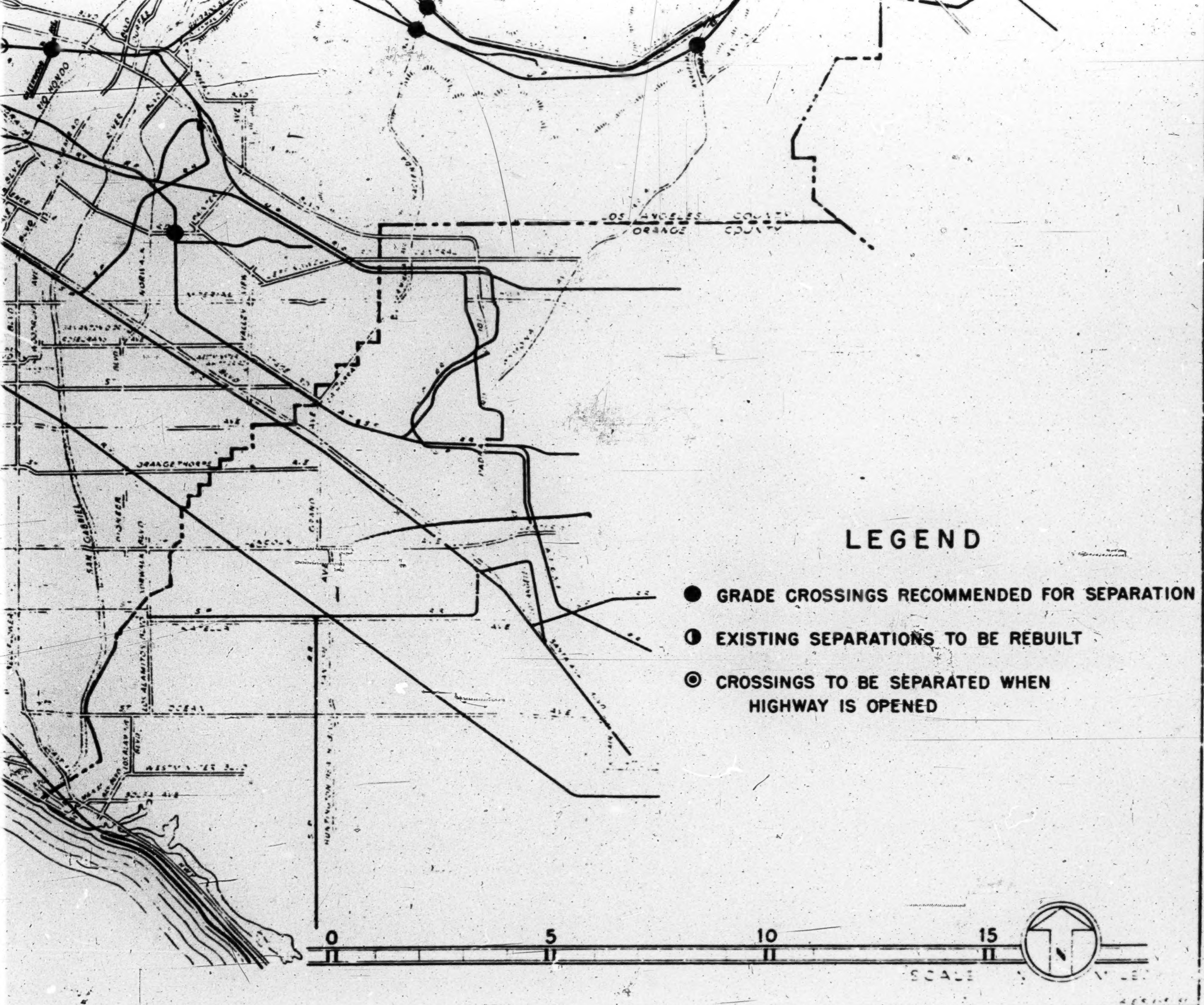
LOS ANGELES COUNTY GRADE CROSSING COMMITTEE

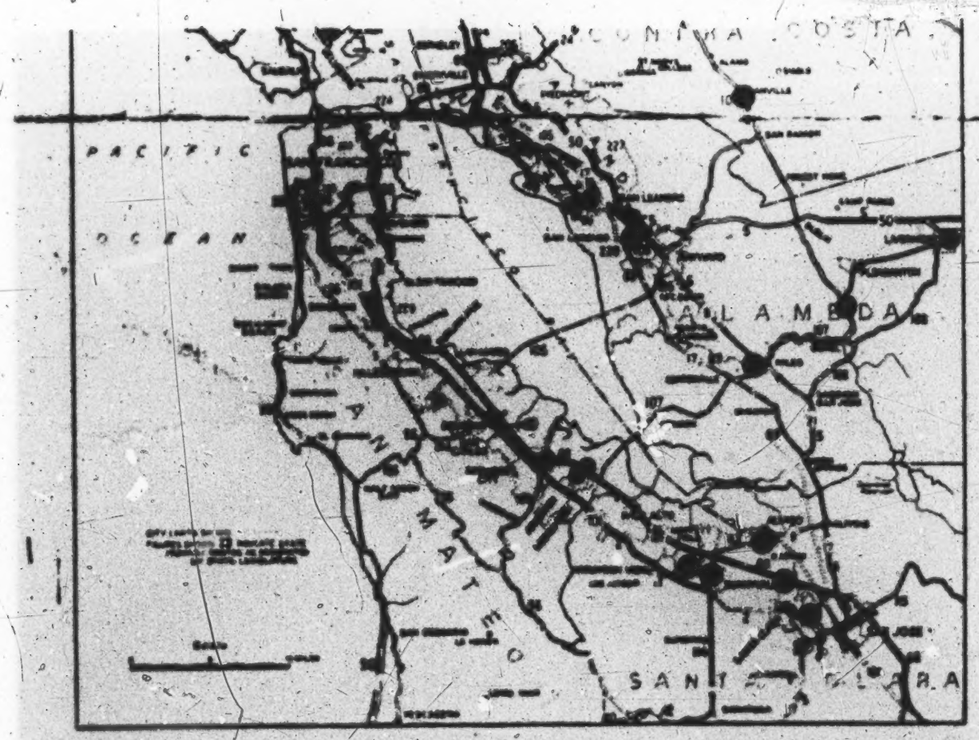


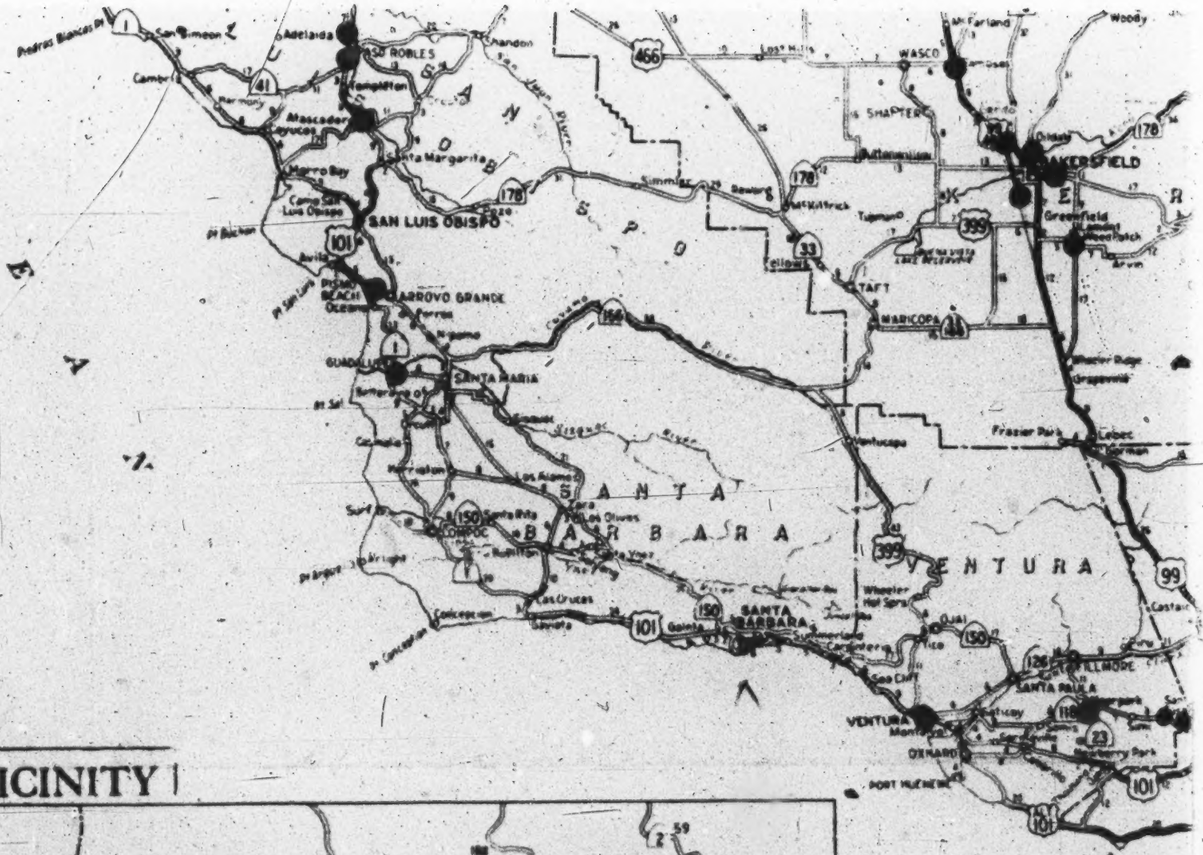
THE REGIONAL PLANNING COMMISSION

COUNTY OF LOS ANGELES

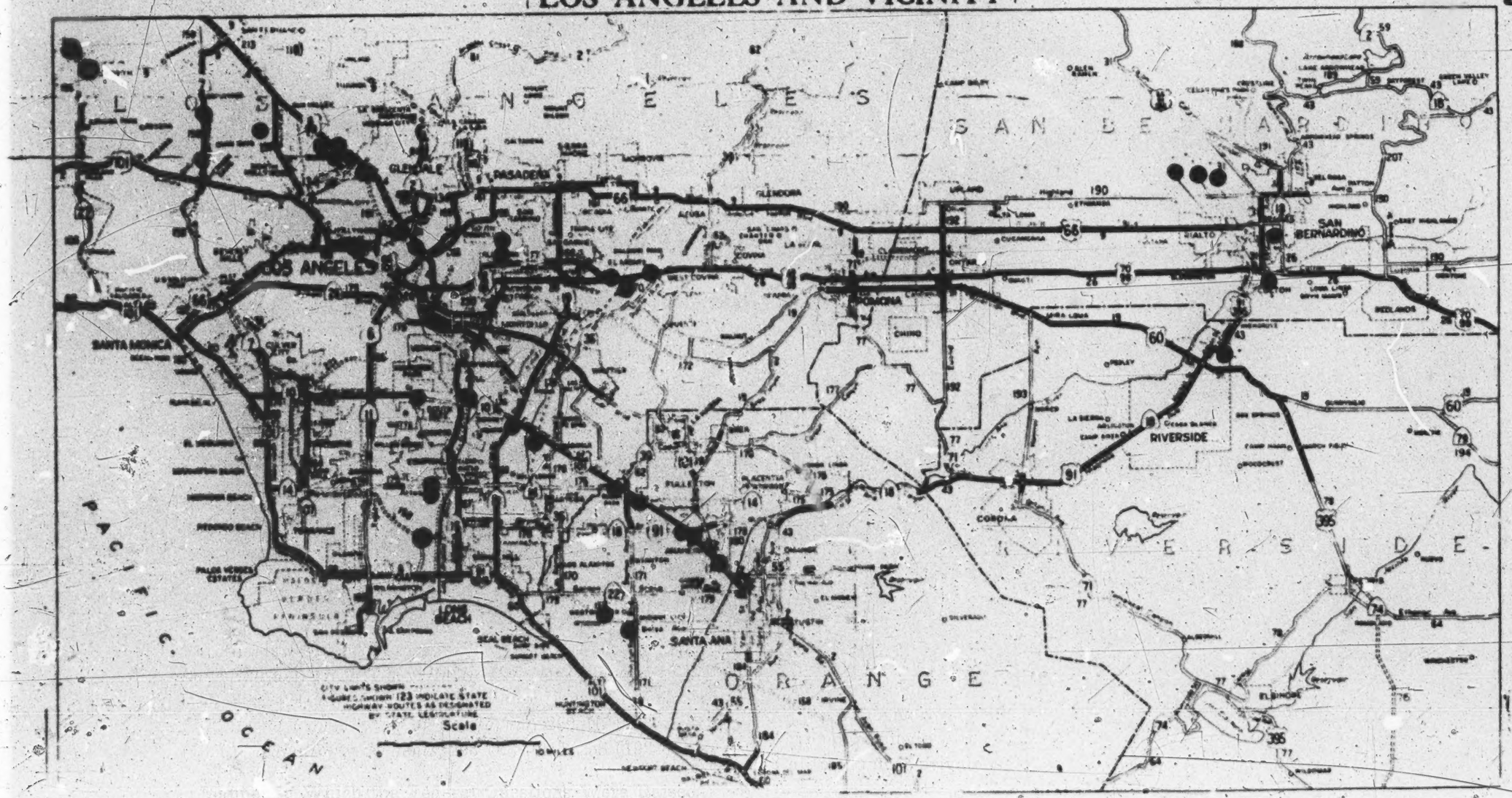

VENICE
SANTA MARIA AVE
CLAUSEN
VAN CHESTER
IMPERIAL
EL SEGUNDO
ROSECRANS AVE
BEACH
SEPULVEDA
SEGUNDO
GOULD AVE
DOMINGUEZ
190th
TORRANCE
PALOS VERDES DR. E
PALOS VERDES DR. N
LOS ANGELES
CENTER
ORANGE WOOD
SAN GABRIEL

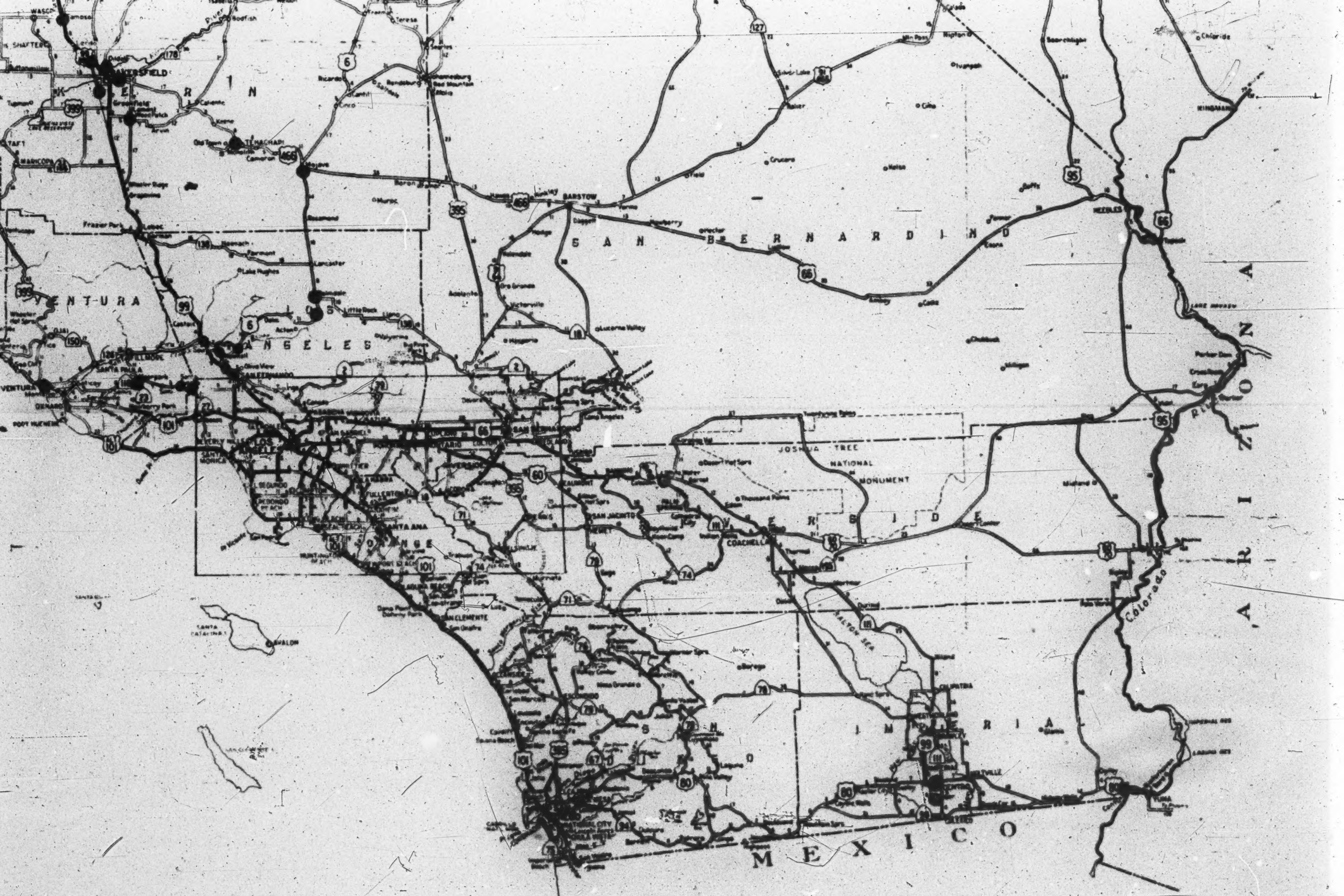

LEGEND
GRADE CROSSINGS RECOMMENDED FOR SEPARATION
EXISTING SEPARATIONS TO BE REBUILT
CROSSINGS TO BE SEPARATED WHEN HIGHWAY IS OPENED
0
5
10
15
SCALE





LOS ANGELES AND VICINITY




KERN
SAN BERNARDINO
VENTURA
LOS ANGELES
ORANGE
RIVERSIDE
IMPERIAL
BAKERSFIELD
BARSTOW
SANTA ANA
COACHELLA
JOSHUA TREE
NATIONAL
MONUMENT
MEXICO
Colorado
Salton Sea

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FILED
OCT 13 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 22

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA AND CITY OF LOS ANGELES,

Appellees.

No. 43

SOUTHERN PACIFIC COMPANY, A CORPORATION,

Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA AND R. E. MITTELSTAEDT, JUSTUS F. CRAEMER, HAROLD P. HULS, KENNETH POTTER AND PETER E. MITCHELL, AS MEMBERS OF AND CONSTITUTING SAID COMMISSION,

Appellees.

APPEALS FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA.

APPELLANTS' JOINT REPLY BRIEF.

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SIDLEY, AUSTIN, BURGESS & SMITH,
Of Counsel for Appellant in No. 22.

THE SUNNYSIDE-WARREN PRINTING COMPANY, CHICAGO

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II. The jurisdiction of this Court on appeal	9
A. Appeal rather than certiorari is the proper procedure	9
B. Even if appeal were improper this Court would consider the cases under its certiorari jurisdiction	13
III. Miscellaneous points raised by appellees	16
A. The scope of the grade separation program in California	16
B. "Grade separation [costs] are passed on to the rate payers of the railroad in the form of rates"	17
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Miscellaneous.

Beggs, The Railway-Highway Grade Crossing Problem 19, 20, 23
Davis, The Railroad Grade Crossing Problem 7, 8, 17
National Conference on Street and Highway Safety, Guides to Traffic Safety 24
Robertson and Kirkham, Jurisdiction of the Supreme Court 10

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APPEALS FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA.

APPELLANTS' JOINT REPLY BRIEF.

STATEMENT.

Preliminary to a short reply to certain of the matters raised by appellees in their answering briefs, appellants deem it appropriate to make a statement concerning the relationship between these two cases. Appellees now protest that there are factual differences that make joint consideration of the two cases improper.

We have heretofore pointed out that there are certain differences between the two rail-highway intersections here involved, notably that in one instance the grades are already separated and in the other they are not. But the fact is, nevertheless, that the appellee Public Utilities Commission, in determining the assessment of grade separation costs, treated the two cases as identical, despite these factual differences, and levied identical percentage allocations (50%) against the respective railroads. Indeed, in No. 43, the *Southern Pacific* case, the Commission summarily disposed of the allocation of costs question by saying:

> "While the railroad contended that the costs should be assessed according to the so-called 'benefits' theory, *we affirm our holding in Decision No. 47344* [the *Santa Fe* case], wherein it was held that the authority of this Commission to allocate costs stems primarily from Section 1202 of the Public Utilities Code and is an exercise of the police power on the part of the State of California through the medium of its agency, the Public Utilities Commission. Therefore, we are not bound

to follow the so-called 'benefits' theory, * * *'" (SR. App. 32)[1]

It was the *Commission*, therefore, which disregarded the factual differences in the two cases. It did so by adopting a policy of arbitrary assessment of 50% of the costs of the separation against the railroad involved *whatever* the facts showed with respect to the benefits the appellants would derive therefrom. Appellants, in their joint brief to this Court, have treated the factual differences in the two cases as immaterial to decision of the legal questions here involved because the Commission held the facts to be immaterial to its assessment of costs against them.[2]

It should also be pointed out that precisely the same arguments were presented to the California Supreme Court in both cases, that the Commission urged that court to dismiss the Southern Pacific's petition for writ of review on the ground that its earlier denial of the Santa Fe's petition "also disposes of the issues in the instant proceeding" (SR. 163-164), and that the same two supreme court judges dissented from denial of appellants' respective petitions. Nor, despite their protests, do appellees point out how the

---

[1] Emphasis is supplied throughout unless otherwise indicated. References to the Commission's brief will be indicated "(Comm. br., p. . . . .)"; to the joint brief of the Cities of Los Angeles and Glendale in No. 43 as "(Cities br., p. . . . .)" and to the brief of the City of Los Angeles in No. 22 as "(L.A. br., p. . . . .)."

[2] The Court will recall that in its Statement in opposition to the Santa Fe's Statement as to Jurisdiction, the Commission stated:

> "And there is no logical or legal basis for the contention that the costs of the instant Washington Boulevard grade separation improvement be borne by the parties respectively in accordance with the benefits to be derived by them nor are any such benefits mathematically calculable. By the great weight of judicial decision above cited, *the element of direct benefit is absolutely immaterial.*" (p. 8.)

An identical statement was made in the Commission's opposing Statement in the *Southern Pacific* case (pp. 10-11). See also the briefs of appellees in the court below (SR. 132, 180), where much the same language was employed.

factual differences affect the questions presented to this Court.

Appellants' brief was prepared jointly in a good faith attempt to present the issues here involved as they were presented to the court below and with a minimum of duplication.[8]

[8] The Commission's remarks concerning appellants' use of materials of which this Court may take judicial notice overlook the fact that much of this Court's opinion in the *Nashville* case relied upon similar data, and the further fact that the Commission itself, by urging the Supreme Court of California not to grant a writ of review and thus bring up the record before the Commission (AR. 115; SR. 165), was successful in excluding this very material (contained in considerably greater detail in Santa Fe Exhibit No. 29 R.H.) from the record before this Court.

ARGUMENT.

Appellees do not take issue with the fact that *Nashville, C. & St. L. R. Co.* v. *Walters*, 294 U. S. 405 was decided at a time when a revolution in highway transportation was already under way, nor with the showing made in appellants' brief that that revolution has continued to the present day with accelerated force and impact. They do not deny that the highway, particularly in California, has become a principal artery of transportation, competitive with the railroads, nor do they deny that the primary occasion for the building or enlargement of railroad-highway grade separations is now the tremendous increases in *highway* traffic rather than any change or increase in railroad operations.

With respect to the *Nashville* case, appellees again assert that it is a "single unique" decision (Comm. br., p. 15) having no applicability apart from the precise factual circumstances there involved. They lay particular stress upon the fact that Mr. Justice Brandeis, in referring to the previous decisions involving grade separations, had held them inapplicable, stating:

> "* * * No case involving like conditions has been found in any of the lower Federal courts; nor, excepting the case here under review, has any such been found among the decisions of the highest courts of any State." 294 U. S. at 431 (Comm. br. p. 15; Cities br. p. 27).

Appellee's reliance upon this statement reveals that they have completely misconceived the fundamental basis of this Court's decision. The *reason* why no case was found involving like conditions—the *reason*, in other words, why the older decisions were inapplicable—was that a "transportation revolution" had occurred in the meantime. Grade

separations, which were once built for the primary benefit of the railroad, were now being built primarily to serve the needs and conveniences of a competitive form of transportation. No cases "involving like considerations" were found when this Court decided the *Nashville* case because the "considerations" there involved were new. Chief among those considerations, of course, was the growth and development of highway traffic as the occasion for grade separations, and the relative decline of that of the railroads.

While the principal contentions made by appellees have been considered in appellants' opening brief, certain subsidiary matters raised by appellees will be commented on below:

I.

THE SAFETY FACTOR IN GRADE SEPARATION CONSTRUCTION.

Appellees seek to avoid application of the "benefits" principle by asserting that an accident hazard still exists at the locations of the proposed new separations, and, therefore, that the standards laid down by this Court in the *Nashville* case are inapplicable to the Commission's action here in issue. Thus the City of Los Angeles asserts in its brief in the *Santa Fe* case:

> "Safety to the public, today, as in the past, fully warrants the order of the California Public Utilities Commission complained of by appellant in the case at bar." (L. A. br. p. 27)

This contention completely misses the point made by Mr. Justice Brandeis in the *Nashville* case. The point was not that grade separations built today may not alleviate dangers to highway traffic, but rather that the factor of hazard is no longer the *principal* reason for construction of separations, but only a subsidiary con-

sideration, in respect to which the railroad may be and generally is benefited. This Court there said:

> "The *main* purpose of grade separation therefore is *now* the furtherance of uninterrupted, rapid movement of motor vehicles. * * * The railroad has ceased to be the prime instrument of danger and the main cause of accidents. It is the railroad which now requires protection from dangers incident to motor transportation." (294 U. S. at 421-422)

Where removal of danger was once the chief or sole reason for separation of grades, it is now subordinate to economic considerations, primarily the dominating purpose of speeding up and thus reducing the cost and improving the efficiency of highway transportation.

The same point was made by the Director of the Institute of Transportation and Traffic Engineering of the University of California, when he stated in 1950:

> "During the past two or three years there has been mounting public interest in, and pressure for, increased railroad-highway crossing separation. It would appear that this pressure, which may be taken as a measure of an unfilled need, *is out of proportion to the accident hazard on the public highways.* It would appear further, that this pressure derives, in considerable measure, from irritation on the part of an ever-increasing driving public, over delay factors rather than accident hazard."[4]

Crossing protection fully adequate to remove the accident hazard at grade crossings can be installed and maintained for a fraction of the cost of the million-dollar grade separations now being built. Thus, as this Court pointed out in the *Nashville* case, there has been a marked "change in the *occasion* for elimination of grade crossings, in the *purpose*

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[4] Davis, *The Railroad Grade Crossing Problem* Proceedings of Engineering Section, 1950 Governor's Traffic Safety Conference (California), p. 31.

of such elimination, and in the *chief beneficiaries* thereof." (294 U. S., at 416)

While counsel for the Commission seek now to emphasize "safety" as a factor in these proceedings, they are careful not to assert that it was the occasion or justification of the Commission's action. The challenged orders preclude any such contention. In its brief the Commission states (Comm. br. pp. 19 and 20):

> "One of the highly important topics * * * studiously avoided by each of the appellants is the matter of safety, welfare and convenience of the comparatively large number of pedestrians using the Los Feliz and Washington Boulevard crossings."

Reference is then made to Exhibit 2 in the *Southern Pacific* case. However, the exhibit cited, introduced by the Commission's own counsel, shows that in 25 years no pedestrian has ever been hurt at the Los Feliz crossing and, in view of the safety gates and warning devices in use there, it is quite inconceivable that the record could be otherwise. (See SR. App. 87-91.)[5]

Again on page 20 of its brief, the Commission says:

> "In both proceedings the Commission, in specifically finding for the 'public safety, convenience and necessity' * * *"

This statement is contrary to the fact. In the *Santa Fe* case, in which a grade separation structure already exists, the Commission's long order does not so much as mention safety, or accident hazard as a reason for the new structures. Instead it simply affirms the findings in its prior decision that "the necessity for such widening is not due to

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[5] The Cities' bald statement that the Los Feliz crossing "has been the scene of many accidents" (Cities br., p. 14) is revealed by the record to refer to the fact that there have been exactly *14* accidents in *over 25 years*, with *total* property damage of only $5,546. The proposed grade separation will cost $1,493,200!

the activities of the railroad" (AR. 142). In the *Southern Pacific* case, where an identical percentage assessment was made against the railroad, the only reference to safety is contained in the formal conclusion of the Commission in which it is stated, in orthodox fashion, that the new separation is "in the public safety, convenience and necessity." (SR. App. 32.) See *Chicago, St. P. M. & O. Ry.* v. *Holmberg*, 282 U. S. 162, 166-167 (1930).

As pointed out in appellants' opening brief (p. 54), it is the unanimous opinion of experts that grade crossings nowadays do not present critical highway safety problems; that grade separation construction must be justified, instead, by economic considerations. Insofar as construction of a grade separation also eliminates the expense of crossing protection, the railroads are benefited; but this expense is usually quite small by comparison with the total cost of the separation. It is the large percentage of such costs, unrelated to safety, which the Commission now seeks to thrust upon the railroads.

II.

THE JURISDICTION OF THIS COURT ON APPEAL.

A. Appeal Rather than Certiorari Is the Proper Procedure.

Appellees, the Cities of Los Angeles and Glendale, argue that this Court's jurisdiction should have been invoked by petition for writ of certiorari rather than by appeal. It is significant that the Commission does not join in this argument and carefully avoids the contention made by the Cities. The cases relied upon for this proposition demonstrate the contrary with complete clarity.

In *Live Oak Water Users' Ass'n.* v. *Railroad Commission*, 269 U. S. 354, cited by the Cities, this Court had before it on writ of error a decision of the Supreme Court of

California affirming a rate order of the State Railroad Commission. This Court held that the appeal could not be allowed, although "for jurisdictional purposes the order of the Commission must be treated as though an Act of the Legislature" (269 U. S. at 356), for the reason that the plaintiffs in error had not challenged the Commission's order on federal grounds in their petition to the Supreme Court of California. That court, accordingly, had not considered or passed on the federal questions raised by the application for writ of error to this Court. Applying well established principles, this Court ruled that it had no jurisdiction because the decision below was based upon a point of local law "and leaves no federal question open for our determination." (269 U. S. at 359.) This conclusion would necessarily have been reached whether plaintiffs in error had proceeded by writ of error or certiorari.*

Appellee Cities do not and could not contend that either the Santa Fe or the Southern Pacific failed to raise the federal questions in their petitions to the court for writ of review. Paragraph V of the Santa Fe's petition specifically states:

> "By its Decision No. 47344, dated June 24, 1952, the Commission * * * deprived Santa Fe of its constitutional rights to due process and equal protection of the laws, and of its property without just compensation, placing an undue burden on interstate commerce, all in violation of the Constitution of the United States of America, 5th and 14th Amendments, and the Commerce Clause, * * *." (AR. 3-4.)

There follow eight subparagraphs containing detailed specifications in support of this federal claim. (AR. 4-7.)

If more were needed, the conclusive answer to the Cities' argument is given by the order signed by the Chief Justice

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*See Robertson and Kirkham, *Jurisdiction of the Supreme Court* (Wolfson and Kurland edition), pp. 135-136.

of the Supreme Court of California allowing the appeal to this Court, in which it is noted that:

> "* * * there was drawn in question in this cause the validity of an order of the Public Utilities Commission of the State of California on the ground of its repugnance to the Constitution and laws of the United States and that the decision of this Court was in favor of its validity." (AR. 255.)

Substantially similar statements appear in the Southern Pacific's petition for writ of review (SR. 7-9) and in the order of the Chief Justice allowing its appeal to this Court. (SR. 289.)

Appellee Cities once again reiterate the contention that, because appellants have never challenged the Commission's direction that the grade separations should be built, but have based their claim that the orders are invalid solely upon the ground that the cost allocations were arbitrary and unreasonable, the state action complained of was judicial rather than legislative in nature. It follows, they contend, that certiorari rather than appeal should have been sought.

This argument, which was advanced in the Cities' motion to dismiss or affirm, was answered by appellants at pages 79-84 of their opening brief. The anomaly of the Cities' argument may be highlighted, however, by several considerations.

First, the Public Utilities Commission asserted in the decisions here involved that in allocating the costs of the separation structures it was exercising delegated legislative power.[1] Again, in its answer to the Santa Fe's petition for writ of review, the Commission pleaded that "its

[1] It explicitly declared that the very phase of its order which allocated costs was an exercise of police power and therefore the Commission is not bound to follow the benefits theory. (AR. 130; SR. App. 32.)

decisions in the execution of such legislative authority *have the same force and effect as a statute enacted by the Legislature;*" that "the test of the constitutionality applicable to a statute applies equally to the constitutionality of the decision involved here.'" (AR. 105.) The Cities are thus attempting to convert an act done by the Commission under its "legislative authority" into a judicial act.

Second, Los Angeles, itself, in its answer to the Santa Fe's petition for writ of review, stated:

> "The California Public Utilities Commission, in its Decision No. 47344, from which petitioner is seeking a writ of review, clearly set forth the law when it stated:
>
> * * * * *
>
> 'The authority of this Commission to allocate cost * * * *is an exercise of the police power* on the part of the State of California through the medium of its agency, the Public Utilities Commission. * * * .'" (AR. 157-158.)

Moreover, the City prefaced one section of its argument before the courts below with the statement that the assessment of grade separation costs against the railroads "* * * is a proper exercise of police power by or on behalf of the sovereign." (AR. 159.) The City of Los Angeles is thus in the position of having urged before the Supreme Court of California that the allocation of grade separation costs was an exercise by the Commission of delegated *legislative*

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[8] Oddly enough, in their joint brief to this Court in the *Southern Pacific* case, the Cities of Los Angeles and Glendale, after adopting the argument made in the *Santa Fe* case that the Commission's allocation of costs is a judicial act (Point I), then join in the argument that the Commission's action was legislative in character, and that its allocations of costs therefore carry the "presumptive validity" of a statute (Point II).

authority,[9] yet of contending before this Court that it was an exercise of *judicial* power.

Finally, the Cities attempt to distinguish *Grand Trunk Western Ry. Co.* v. *Railroad Commission*, 221 U. S. 400 (1911), a precise authority on this issue, on the ground that it involved the question whether an order allocating costs was a "law of the state," within the meaning of the contract clause of the Constitution, rather than "a statute of any state" within the meaning of Title 28 U. S. C. Section 1257(2). Without considering whether the two phrases are in all respects synonymous, the fact remains that in the *Grand Trunk* case this Court stated that a railroad crossing cost allocation order "is a legislative act by an instrumentality of the state exercising delegated authority (*Prentis* v. *Atlantic Coast Line R. Co.*, 211 U. S. 210, 226), is of the same force as made by the legislature, *and so*, is a law of the state within the meaning of the contract clause of the Constitution." 221 U. S. at 403. In other words, this Court held that the order was a "law of the state" for the same reason that administrative orders are held to be "statute[s] of any state," namely, that they are legislative acts by an instrumentality of the state.

B. Even if Appeal Were Improper, this Court Would Consider the Cases Under Its Certiorari Jurisdiction.

Appellee Cities, proceeding from the faulty premise that the Commission acted judicially in allocating costs and that the certiorari route should have been followed, next argue that this Court cannot consider the merits of these cases on certiorari. The argument seems to be that

[9] The sovereign of course exercises the police power by legislative acts. "The Legislature is possessed of the entire police power of the state, except as its power is limited by the provisions of the Constitution." *Frost* v. *City of Los Angeles*, 181 Cal. 22, 28, 183 Pac. 342, 345 (1919).

since the Supreme Court of California refused to order up the record before the Commission, this Court is foreclosed from reviewing the Commission's "judicial" action. (Los Angeles Brief, Point II.) The asserted reason for this is that the Commission's order cannot be considered on its face because its validity depends upon the particular facts, and that all of these facts are before the Court. (Los Angeles Brief, Point III.)

But the only method of reviewing an order of the California Public Utilities Commission is by petition for writ of review addressed to the State Supreme Court. *Public Utilities Code of California*, §§ 1756, 1789. While such judicial review is discretionary with the court, it is unquestioned that denial of the petition operates as an affirmance of the Commission's order. The record before the Commission is not before the court when it acts upon the petition; rather, the statute contemplates that the writ of review, if granted by the court, "shall direct the commission to certify its record in the case to the court." (*Id.* § 1756.) Appellants' petitions specifically requested:

> "That the writ of review issue out of this court to the Public Utilities Commission, demanding it to certify fully to this court, at a specified time and place, the record and proceedings in this cause, that the same may be inquired into and determined by this court." (AR. 7; SR. 9.)

Thus, by refusing to grant the writs, the Supreme Court of California refused to call up the record of the proceedings before the Commission. The records filed by appellants in this Court constitute the entire records that were before the state supreme court.

The Cities' position is that their success in inducing the court below not to call up the records before the Commission defeats review by this Court of the federal questions presented under any procedure. We submit, on the con-

trary, that the action of the Supreme Court of California makes this Court's task much more simple and precise. The Commission held unequivocally that in allocating grade separation costs it was exercising police power and, *therefore*, was not required to consider the facts as to the benefits to be received by the railroad from the new construction. Nor was its 50% assessment related in any way to an evaluation of such benefits; in both cases the Commission took pains to assert that "we are not bound to follow the so-called 'benefits' theory." (AR. 130; SR. App. 32.)

These matters, plus the basic facts surrounding the controversies, were presented to the Supreme Court of California in appellants' petitions for writs of review. That court affirmed the Commission's holding on the merits without having before it the records before the Commission. In short, the California court took precisely the same position as did the Supreme Court of Tennessee in the *Nashville* case, namely, that because an arbitrary assessment against the railroad represented an exercise of police power, it was unnecessary to inquire into the facts. The refusal of the Supreme Court of California to call up the record and to consider the facts is erroneous for exactly the same reason that it was error for the Tennessee court to refuse to consider the facts in the *Nashville* case. That, indeed, is one of the errors specified by appellants in these cases. (Brief p. 13.)

The Cities' contention that this Court cannot review the Commission's "judicial" action is thus frivolous. This Court now has before it the entire record that was before the Supreme Court of California when it denied appellants' petitions for writs of review. The Cities do not suggest that the California court had no jurisdiction to pass on the validity of the Commission's order or that it erred in doing so. Reduced to its essentials, therefore, the completely baseless contention of the Cities is that this

Court cannot review the validity of the Commission orders under the Constitution of the United States even though the Supreme Court of California did so *on precisely the same record.*

III.

MISCELLANEOUS POINTS RAISED BY APPELLEES.

Certain statements and arguments made by appellees in their briefs deserve brief reply, although none touches the basic issues presented by these appeals. Such statements will be considered *seriatim:*

A. The Scope of the Grade Separation Program in California. (Cities br. p. 39.)

In the *Southern Pacific* case the Cities state that the appellants are unduly concerned by the great and increasing number of grade separation projects being pressed in California: "It should suffice to say that the plan for the separation of grades at many grade crossings has been under consideration for almost 30 years." (Cities br. p. 39.) A pertinent comment upon this complacent observation is to be found in a communication from the State Highway Engineer of California, dated September 18, 1953, to the Chief Engineer of the Santa Fe (set forth as Appendix A hereto) in which, after referring to the addition of four more grade separation projects to the 1953-54 highway construction program, he declares:

> "It is reasonable to assume that the Public Utilities Commission will follow the precedent set down in the Washington Boulevard case whereby the railroad would be ordered to pay 50% of the cost of widening."

The program of separating grades in California, as else-

where, has accelerated greatly in recent years. As noted above (p. 7) a University of California transportation expert stated in 1950:

> "During the past two or three years there has been mounting public interest in, and pressure for, increased railroad-highway crossing separation."

B. "Grade Separation [Costs] Are Passed on To the Rate Payers of the Railroad in the Form of Rates." (Comm. br. p. 17.)

The Commission seems to suggest as an answer to appellants' contentions that the railroad's grade separation costs can simply be passed on to rate payers in the form of higher rates. This assertion well illustrates the Commission's refusal to consider present-day realities. The fact is that the railroads cannot pass on grade separation costs because these very expenses go to improve the operating efficiency and to lower the costs and rates of their highway competitors. Increasing railroad rates to build highway improvements simply widens the gap that now exists and drives more business to trucks, buses and automobiles. It is uncontradicted in the record that:

> "It is impossible to pass the costs of a specific project such as this by increasing rates, although the railroads' shippers will eventually have to stand the costs. There are frequent calls for the railroad to contribute to the costs of such structures in other states. The effect of such contributions is to make it more difficult to meet competition." (AR. 30-31.)

This Court recognized the same problem when it referred, with respect to passenger traffic, to

> "the growth of vigorous competition from automobiles and other forms of transportation which made it futile to compensate for the passenger deficits by in-

creasing passenger rates." *King* v. *United States*, 344 U. S. 254, 262 (1952).

Thus, the short answer to the claim that arbitrary grade separation costs can be passed on in the form of higher rates is that, under present conditions, they cannot.

C. "Appellant's Allocated Costs Are Only 35% of the Total Cost of the Improvement." (L. A. br. pp. 6-8.)

The City of Los Angeles states, although in what connection is not clear, that the Santa Fe is paying only 35% of the total cost of the improvement and only 40.6% of the "added cost occasioned by the presence of the railroad structures." This claim is flatly contradicted by the Commission's decision and order, which states that the cost of the bridges will be $569,355, half of which is allocated to the railroad, and that:

> "The remaining costs are clearly attributable to the paving and widening of the street." (AR. 130.)[10]

The City has never questioned this conclusion either by petition for rehearing before the Commission or by petition to the Supreme Court of California. The City is thus apparently attempting to tax the railroads with costs, such as paving and sewer expense, which it would have incurred in widening the street in any event.

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[10] The Commission specifically stated in its order:

> "1. Fifty per cent (50%) of the costs of the proposed structures attributable to the presence of the railroad tracks, as defined in the foregoing opinion, excluding the costs attributable to the paving and widening of the street shall be borne by The Atchison, Topeka & Santa Fe Railway Company, and the remainder of the costs shall be borne by the City of Los Angeles." (AR. 131.)

D. "Appellant Has No Property Right in the Continued Maintenance of Such Structures Which Will Support a Constitutional Right to Compensation." (L. A. br. pp. 22-25.)

The argument of the City of Los Angeles in Point IV of its brief (L. A. br., pp. 22-25) that the Santa Fe's present separations constitute a "barrier" across its easement was neither adopted by the Commission in its order nor argued in its briefs and is, of course, inapplicable to the *Southern Pacific* case. It is an anomaly to argue that the presence of existing separation structures which were placed in their present location by the joint action of the city and the railroad now justify the imposition of arbitrary costs upon the railroad for construction of *new* separation structures, made necessary by increased highway traffic. See also AR. 238-240. This contention that a separation structure may be ordered into place and later, for the purpose of assessing costs, be deemed to have become an "obstruction," is simply another form of attack upon the benefit principle and is completely contrary to the rationale of this Court's decision in the *Nashville* case.

Dr. A. Kenneth Beggs, in his extensive study of the grade crossing problem, commented on this so-called barrier theory as follows:

> "Two charges may be leveled against this basis of cost distribution. First, its contentions are not substantially true. The railroads have been an important aid rather than a barrier to economic and social development in areas of the state which they serve. To insist that the railroad is a barrier is an argument for relocation of railroads, not merely the elimination of crossings or an increase in the portion of costs a railroad should be assigned for improvements. In addition, the barrier theory provides no basis upon

which to distribute costs as between the railroads and the public. Reliance must be placed upon subjective opinions by the Commission as to what may be traditional, acceptable, and reasonable amounts to assign to railroads. The basis has no relationship to economic principles which should govern in cost allocation."[11]

E. The Position of Appellants as Owners of Highway Transportation Companies. (Comm. br. p. 5.)

The Commission makes reference to the fact that appellants are the owners of subsidiaries which operate highway vehicles. The implications of the statement are not clear. The Commission certainly is not suggesting that one rule of law should apply to railroads which own highway vehicles while another totally different rule applies when no such relationship exists.

If what the Commission implies is that owners of highway vehicles (including appellants' subsidiary companies in this case) receive and should pay for the benefits resulting from grade separation construction, we agree wholeheartedly. Whatever the taxes imposed upon such subsidiaries, in common with other highway users, to pay the cost of highway improvements, such taxes will be and are being paid. (SR. 213.)

F. Appellants' Statement of the Facts. (Cities br. pp. 2-3.)

The Cities in their brief in the *Southern Pacific* case assert (pp. 2-3) that appellant's statement "did not give a fair picture of the facts;" that throughout the proceedings in the court below appellant had referred to and urged only the evidence presented before the Commission most favorable to it, and had ignored or incorrectly stated

[11] Beggs, *The Railway-Highway Grade Crossing Problem*, Stanford Research Institute, Stanford, Cal. 1952, p. 50.

other facts.[12] This assertion may be compared with the Cities' statement in their brief to the court below, commenting upon the Southern Pacific's petition to that court (SR. 167):

> "The evidence as summarized by petitioner in its brief is quite comprehensive; however, certain additional evidence should be noted, and other evidence emphasized."

Following this statement the Cities presented a page and a half of summary, largely repetitious of matters appellant had already presented. The Commission accepted the Southern Pacific's summary of evidence without comment. Moreover, the Supreme Court of California apparently considered the statements adequate for its purposes, since it refused to order the record brought up. Indeed as pointed out above (*supra*, p. 14), appellees themselves, by their answers in the court below, urged it to refuse to consider the record in its entirety.

G. Erroneous Statements of the Record in Appellees' Briefs. (Passim.)

The briefs of the Cities of Los Angeles and Glendale contain a number of inaccuracies carried over from their briefs before the California Supreme Court in opposition to appellants' petition for writ of review. For example, in their joint brief in the *Southern Pacific* case, the Cities state that the number of freight movements across Los Feliz "has increased materially since 1936" (Cities' br. p. 15), citing as a record reference the Cities' brief before the state court. But the inaccuracy of that statement had been demonstrated in the Southern Pacific's reply brief

[12] No similar assertion is made in the *Santa Fe* case, although that case has been presented in the court below, and in this Court, in the same manner as the *Southern Pacific* case.

below (SR. 251-253), where it was also pointed out that the switching movements at Los Feliz have been static for many years. Similarly, the statements in the Cities' brief regarding "public safety hazard" and "backlash" of traffic (Cities' br. pp. 3, 14-15) are completely refuted by the only evidence on the subject, which was set out in full below at SR. 253-254.

H. State Cases Referred to By Appellees. (Cities br. pp. 29-34; Comm. br. p. 11.)

Reference is made by appellees in their briefs to several state court decisions involving grade separation costs, although the significance of such decisions, even if they supported appellees' position, is not clear in view of this Court's decision in the *Nashville* case. That they do not support the Commission's action was pointed out in detail below. (SR. 256-259.) In cases decided subsequent to the *Nashville* decision, state courts have applied this Court's reasoning in rejecting arbitrary assessments against railroads. See, *e. g., In re Elimination of Existing Highway-Railroad Crossing* (App. Div.), 5 N. Y. S. 2d 946; *In re Elimination of Highway-Railroad Crossings*, 299 N. Y. S. 693; *W. J. Howey Co.* v. *Williams*, 142 Fla. 415, 195 So. 181, 183-184.

CONCLUSION.

Appellees all assert that the Commission did not employ the benefit principle from 1933 to the date of its decision in these cases, as appellants had indicated, that it is difficult or impossible to determine benefits, and that adoption of the benefit basis would lead to delay in grade separation construction. Brief answers may be made.

First, with respect to the Commission's former posi-

tion, appellants pointed out (brief, p. 65, note 62) that in 1933 the Commission stated specifically that grade separation costs were allocated: "Some cases by agreement, others by Commission allocation as measured largely by benefits." This statement, and the Commission's language in the *Goshen Junction* case (see brief, pp. 64-65), speak for themselves. Moreover, Beggs, in his study heretofore cited, makes this comment regarding the Commission's decision in No. 22, the *Santa Fe* case:

> "With this decision the Commission has retracted from its position on distributing costs in accordance with benefits and has reverted to its former position of a fifty-fifty division of costs between the railroads and the public."[13]

We quite agree that the Commission may "take inconsistent action in different cases" (Comm. br., p. 13). Some further explanation seems required, however, when a fundamental change in conditions has long been recognized and the shift of position results in repudiation of a principle of constitutional law recognized by the Supreme Court of the United States.

Second, the short answer to the claim that benefits are difficult to ascertain is that the California Commission and the regulatory authorities of other states and countries have made that very determination for many years. Indeed, the Commission actually made the calculation in the *Southern Pacific* case (SR. App. 28) in determining the economic justification of the Los Feliz separation, but then simply refused to employ those figures in order to determine benefits, or give them any weight for the purpose of the allocation.

Third, the Commission's ill-considered statement (Comm. br., p. 25) that appellants' reliance upon the benefit basis of cost allocation is an attempt to defeat all grade separa-

[13] Beggs, *op. cit. supra* (note 11), pp. 51-52.

tion projects "through prolonged and futile negotiations" simply is not true. For the entire period 1934-1950, when the Commission applied the benefit theory, agreement between the parties was reached in 86 cases involving the Southern Pacific and its affiliates, and Commission decisions were required in only 5 cases. (SR. App. pp. 92-97) Moreover, as was pointed out in appellants' opening brief (p. 60), one of the reasons advanced by the National Conference on Street and Highway Safety in 1924 for adoption of the benefit basis was the fact that, under the arbitrary allocation principle theretofore applied, progress with railroad grade crossing elimination was slowed by the natural reluctance of railroads voluntarily to enter into crossing elimination programs.

The railroads are sincerely interested in the grade crossing elimination programs now in progress throughout the nation. For example, railroad representatives participated in the proceedings leading to the adoption of the comprehensive grade separation program of the Los Angeles County Grade Crossing Committee. But appellants earnestly believe and contend that the imposition upon one small group, the railroads, of a large arbitrary percentage of the cost of promoting the public convenience violates principles of justice and reasonableness made manifest by this Court in its decision in the *Nashville* case.

Respectfully submitted,

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APPENDIX A.

STATE OF CALIFORNIA
DEPARTMENT OF PUBLIC WORKS
SACRAMENTO

Divn. of Highways,
Public Works Bldg.,
P. O. Box 1499,
Sacramento, 7

El Nido Underpass
VII-LA-164-Tor

Sept. 18th, 1953.

Mr. L. H. Powell, Chief Engineer,
The Atchison, Topeka & Santa Fe
Railway Company,
121 East Sixth Street,
Los Angeles 14, California.

DEAR MR. POWELL:

Reference is made to our letter of September 16 wherein you were advised that four grade separations will be added to the current 1953-54 Highway Construction Program, including the proposed widening of the existing El Nido Underpass, Crossing No. 2H-19.0-B, Hawthorne Avenue in Torrence, State Highway Route VII-LA-164-Tor.

Since Hawthorne Avenue is not a Federal Aid Route, it is not eligible for financing with Federal funds and consequently Bureau of Public Roads G. A. M. #325 will have no application to the apportionment of the cost of widening the underpass structure.

The proposed widening is factually similar to the proposed widening of the Washington Boulevard Underpass in Los Angeles. The Public Utilities Commission, by Decision No. 47344 dated June 24, 1952, apportioned 50% of the cost to the railroad. Since that case is on appeal and it is likely that considerable time will expire before a final determination is made, we wish to express to you our views with respect to the apportionment of costs of widening the El Nido Underpass. We believe that under the circum-

stances where the El Nido Underpass and the Washington Boulevard Underpass are similarly situated, it is reasonable to assume that the Public Utilities Commission will wish to follow the precedent set down in the Washington Boulevard case whereby the railroad would be ordered to pay 50% of the cost of widening. We, therefore, hereby formally request the Santa Fe to bear such proportion of the cost of widening the El Nido Underpass. If the railroad does not see its way clear to accept apportionment of cost on the basis of 50%, we believe that the matter should be submitted to the Public Utilities Commission for determination with a request for an interim order authorizing construction in order not to delay completion of the contemplated public improvements, with the understanding that the interim order authorizing the proposed widening shall provide that the costs shall be apportioned in accordance with an agreement to be arrived at between the railroad and the State or in the event the parties cannot agree, the apportionment of costs shall be determined as provided by law.

Your prompt consideration of the Department's proposal with respect to the apportionment of cost is earnestly solicited.

Pending your consideration of the railroad's contribution to the project, we request your approval to proceed with the construction in accordance with plans and specifications which have been submitted to you for approval.

Very truly yours,

(signed) G. T. McCoy,
State Highway Engineer.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952 1953

No. 66722

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, A CORPORATION,

Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, AND CITY OF LOS ANGELES, A MUNICIPAL CORPORATION

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 667

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, A CORPORATION,

Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, AND CITY OF LOS ANGELES, A MUNICIPAL CORPORATION

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

The Public Utilities Commission of the State of California, respondent and appellee (hereinafter referred to as Commission), for its statement in opposition to statement as to jurisdiction herein of The Atchison, Topeka & Santa Fe Railway Company, petitioner and appellant (hereinafter referred to as Santa Fe), and in support of said Commission's motion to dismiss or affirm, respectfully shows the following:

I. Statement of the Facts

Santa Fe, an intrastate and interstate common carrier of freight and passengers by rail and/or motor vehicles

operating between points in California, including the City of Los Angeles, crosses certain streets and highways of said State, including Washington Boulevard in said City.

The Commission is a constitutional body having regulatory jurisdiction over all public utilities including railroads and other transportation companies, with the exclusive power and duty to allocate costs of grade crossing separations. (Sections 17, 19-23a of Article XII of the Constitution of California; the Public Utilities Act and the Public Utilities Code of said State, Statutes 1915, Chapter 91, as amended, and Statutes 1951, Chapter 764, as amended, respectively.)

The authority of this Commission to allocate costs in this matter stems primarily from Section 1202 of the Public Utilities Code (California Statutes 1951, Chapter 764, as amended) from which we quote:

"1202. The commission has the exclusive power:

"(a) To determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use and protection of each crossing of one railroad by another railroad or street railroad, and of a street railroad by a railroad, and of each crossing of a public or publicly used road or highway by a railroad or street railroad, and of a street by a railroad or vice versa, subject to the provisions of Sections 1121 to 1127, inclusive, of the Streets and Highways Code so far as applicable.

"(b) To alter, relocate, or abolish by physical closing any such crossing heretofore or hereafter established.

"(c) To require, where in its judgment it would be practicable, a separation of grades at any such crossing heretofore or hereafter established and to prescribe the terms upon which such separation shall be made and the proportions in which the expense of the construction, alteration, relocation, or abolition of such

crossings or the separation of such grades shall be divided between the railroad or street railroad corporations affected or between such corporations and the State, county, city or other political subdivision affected." (Former Sec. 43(b), 1st sent.)

That on the 4th day of June, 1948, the City of Los Angeles filed its Application No. 29396 with the Commission, seeking authority to enlarge two 20-foot underpasses on Washington Boulevard below petitioner-appellant Santa Fe's four tracks. After public hearing and briefing, the Commission, by its Decision No. 43374 dated October 4, 1949, authorized the City to enlarge the underpasses further providing that the expense thereof was to be borne by the City, with the exception of the sum of $95,160 which was to be paid by Santa Fe. On November 22, 1949, the City filed a petition for rehearing, and on December 2, 1949, Santa Fe filed a petition for rehearing.

Thereafter, a rehearing was granted March 28, 1950, and public hearings were held thereon, followed by opening, closing and reply briefs, including oral argument, on November 28, 1951, before the Commission *en banc*.

On June 24, 1952, the Commission rendered its Decision No. 47344, herein assailed, authorizing the City of Los Angeles to widen and increase the height of the existing underpasses of Washington Boulevard and the Harbor Branch Line and the main line railroads of Santa Fe in keeping with the adopted plans and specifications therein, subject to the following condition:

"Fifty percent (50%) of the costs of the proposed structures attributable to the presence of the railroad tracks, as defined in the foregoing opinion, excluding the costs attributable to the paving and widening of the street, shall be borne by The Atchison, Topeka & Santa Fe Railway Company, and the remainder of the

costs shall be borne by the City of Los Angeles" (51 Cal. P.U.C. 771, 783).

A comprehensive recital of pertinent facts surrounding the governing factual and legal principles is embraced within the Commission's orders comprising the Appendices to Appellant's Statement as to Jurisdiction herein, hence not here further repeated.

It was the position of the City that the Railroad should pay that portion of the cost which is attributable to the presence of the railroad tracks.

It was the position of Santa Fe that the costs should be allocated according to benefits received and since it disclaimed any benefits to the railroad, said Santa Fe would contribute nothing.

The Commission, in adherence to the entire record and in the light of particular facts presented during rehearing, did not subscribe to either of the foregoing contentions of said parties, but stated that "In apportioning the costs of constructing these separations between applicant [City of Los Angeles] and the railroad company [Santa Fe], due consideration should be given to the obligations of each party, as well as to the benefits derived," explaining as follows:

> "The authority of this Commission to allocate costs, as designated in Section 1202 of the Public Utilities Code, supra, is an exercise of the police power on the part of the State of California through the medium of its agency, the Public Utilities Commission. We hold that the law is well established that under the exercise of the police power a state may regulate the crossings of railroads with its highways, and may require grade separations to be erected and maintained, apportioning the costs in the exercise of its sound discretion. (*Erie Railroad Company* v. *Board of Public Utility Commissioners*, 1920, 254 U. S. 394, 65 L. Ed. 322; *Chicago, Milwaukee and Saint Paul Railway Company* v. *Min-*

neapolis, 1914, 232 U. S. 430, 58 L. Ed. 671; *Missouri Pacific Railway Company* v. *Omaha*, 1914, 235 U. S. 121, 59 L. Ed. 157; *Lehigh Valley Railroad Company* v. *Board of Public Utility Commissioners*, 1928, 278 U. S. 24, 73 L. Ed. 161)." (Also *Cincinnati, I. & W. R. Co.* v. *Connersville* (1916) 218 U. S. 336, 54 L. Ed. 1060; *State ex rel. Alton R. Co.* v. *Public Service Commission, Mo.* (1934), 70 S. W. (2d) 57, 60; *Northern Pacific R. Co.* v. *Minnesota ex rel. Duluth* (1907), 208 U. S. 583, 52 L. Ed. 630; *Penn.-Reading S. Lines* v. *Bd. of P. U. C. Com., etc.* (1951), 81A (2d) 28; Affirmed, 82A (2d) 774.)

II. Statement of Issues on Appeal

As purported, in brief: That Commission Decision No. 47344, dated June 24, 1952, prescribing a 50% cost allocation apportionment for Washington Boulevard railroad crossing improvement as between the City of Los Angeles and Santa Fe, would deprive petitioner-appellant of (1) property without due process and (2) of equal protection of the laws and (3) impose an undue and unreasonable burden on interstate commerce.

III. No Substantial Federal Question Is Presented by the Attempted Appeal

The matters herein readily resolve to the single basic question raised by Santa Fe on its appeal to the United States Supreme Court as confirmed in the last-page conclusion of its Jurisdictional Statement; namely, whether or not the so-called *Nashville* case (*Nashville, C. & St. L. Ry.* v. *Walters*, 294 U. S. 405, 79 L. Ed. 949) applies to the instant case at bar.

The Commission, in apportioning the costs of constructing the instant grade separation changes as between the City and Santa Fe, gave due consideration to the obligations of each as well as to the benefits derived (51 Cal. P. U. C.

771, 781) (Appendix B to Appellant's Statement as to Jurisdiction).

We have uniformly contended that the *Nashville* case is no authority for the inference by Santa Fe that the law has now been changed so that railroads cannot be required to pay the costs of grade separations.

As was stated by the Honorable Supreme Court of the United States in the *Nashville* case (p. 964):

> "* * * No case involving like conditions has been found in any of the lower Federal courts, nor, excepting the case here under review, has any such been found among the decisions of the highest courts of any state."

This makes it abundantly clear that the Supreme Court of the United States did not intend that the *Nashville* case should be considered as reversing the long line of prior cases setting forth the railroads' continuing responsibility in connection with grade separations.

Furthermore, Santa Fe, in urging the overthrow of the well-established law of the land in favor of a single unique and distinguishable case—the *Nashville* case, fails to differentiate the latter under statutory requirement when Federal-aided highways are concerned in that no railway involved in a grade-crossing project, constructed in whole or in part from Federal funds, may be required to contribute other than in accordance with the benefits which it shall receive (Federal Aid Highway Act of 1944, 58 Stat. L. 838-841). Washington Boulevard crossing is not a Federal-aid project and no such qualifications have been or are in anywise applicable thereto.

It will be instantly appreciated how the so-called *Nashville* case is wholly dissimilar, both as to governing facts and applicable law, from the instant Washington Boulevard grade separation case, and that the two fundamentally different situations are in no wise comparable, since, as the

record will show, the two separate highways and the two widely separated crossings there involved (being a quarter of a mile or more apart) are separately operated today just as heretofore.

Again, Santa Fe is highly inconsistent in disclaiming numerous benefits and advantages which, as set forth in the assailed decision, inevitably would accrue to it and to its highway-carrier subsidiaries from the Washington Boulevard improvement, including among others newly standardized structures in lieu of outmoded and heavily depreciated 40-year old structures. Washington Boulevard crossing is of impaired clearances, both as to height and width.

And there is no logical or legal basis for the contention that the costs of the instant Washington Boulevard grade separation improvement be borne by the parties respectively in accordance with the benefits to be derived by them nor are any such benefits mathematically calculable. By the great weight of judicial decision above cited, the element of direct benefit is absolutely immaterial. As stated by the Commission, it is one of the factors for consideration but not necessarily the controlling factor.

That the motivating purpose is and the obvious result of Santa Fe's instant attack would be the ultimate defeat, through prolonged and futile negotiations, of any and all future grade separation relief owing to the highly controversial character of the impracticable benefits theory which it here seeks to obtain.

Mindful of the history of Commission grade crossing procedures, it is doubly apparent that the appellant's rail benefits theory here urged would be a perversion of grade crossing regulation as it exists in California and would virtually nullify the present constitutional and statutory mandates for the protection of the public interest under the exercise of the police powers of the State of California.

We steadfastly contend that the orders of the Commission constitute a valid and reasonable exercise of the police power without impairment of any obligation or right whatsoever of Santa Fe, and we deny that the Commission in thus exercising the police power of the sovereign State herein on behalf of the public safety, welfare, convenience and necessity acted arbitrarily or otherwise failed to regularly pursue its lawful authority, or that it acted in excess of its jurisdiction, or that it wrongfully deprived petitioner-appellant [Santa Fe] of rights or property without due process of law, or that it has denied the petitioner the equal protection of the laws in violation of the Constitution of the United States, or that it has taken action which results in undue burdens upon interstate commerce or that its order impinges on the National Transportation Policy of the Congress. (*South Carolina State H. Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 189, 82 L. ed. 734, 741; *Panhandle Eastern Pipe Line Co.* v. *Michigan Pub. Serv. Com.*, 341 U. S. 329, 333, 95 L. ed. 993, 998. *Alabama P. S. Com.* v. *Southern R. Co.*, 341 U. S. 341, 95 L. ed. 1002; *North Carolina* v. *United States*, 325 U. S. 507, 511, 89 L. ed. 1760, 1765.)

This premature and ill-advised appeal by Santa Fe seems born of its anticipatory fears for the future respecting imaginary, but non-existent, legislation whereby it has wholly misconceived or utterly ignored the practicalities of the instant situation and erroneously asserted claims to the existence of a Federal question without any actual foundation therefor. For, while as stated by Justice Holmes in the *Erie Case*, supra,—"That the states might be so foolish as to kill a goose that lays golden eggs for them has no bearing on their constitutional rights" (254 U. S. 410, 65 L. ed. 333), in the more than 40 years of such regulation by this Commission, during which its grade crossing apportionments to the numerous railroads of this State

have ranged variously from zero % to 100%, the official history of such regulation in California affords no grounds for any such fear or implication as petitioner-appellant would infer.

And as stated by the Honorable Supreme Court of the United States, speaking through Chief Justice Vinson, "* * * It is now well settled that a utility has no right to relitigate factual questions on the ground that constitutional rights are involved." (*Alabama-P. S. Comm.* v. *Southern R. Co.*, supra, citing cases.) (*N. Y.*, v. *U. S.*, 331 U. S. 284, 334-336.)

IV. Conclusion and Motion to Dismiss or Affirm

We therefore respectfully submit that the questions presented in this appeal have long ago and repeatedly since been so definitely determined that no substantial Federal questions are presented by this appeal entitling Santa Fe to invoke the jurisdiction of the Supreme Court of the United States.

WHEREFORE, appellee and respondent respectfully moves that the within appeal be dismissed or that the orders of the Supreme Court of the State of California and the decision and order of the Commission be affirmed.

Dated: San Francisco, California, March 12, 1953.

Respectfully submitted,

EVERETT C. MCKEAGE,
Chief Counsel.

HAL F. WIGGINS,
Senior Counsel.

Attorneys for Appellee and Respondent, Public Utilities Commission of the State of California.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952 / 953

No. 687 22

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA AND CITY OF LOS ANGELES

APPEAL FROM THE SUPREME COURT OF CALIFORNIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, A CORPORATION,
Petitioner-Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, AND CITY OF LOS ANGELES, A MUNICIPAL CORPORATION,
Respondents-Appellees

STATEMENT IN OPPOSITION TO APPELLANT'S ASSERTION OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM BY APPELLEE, CITY OF LOS ANGELES.

The City of Los Angeles, a municipal corporation, one of the appellees in the above-entitled cause, respectfully shows the following in opposition to appellant's assertion of the jurisdiction of the Supreme Court of the United States and in support of this appellee's motion to dismiss or affirm:

I

Issue on Appeal

Appellant's contention on appeal is that a railroad company's share of the allocated cost of a grade separation must be based upon benefit to the railroad arising from the absence of a crossing at grade at the point involved. Appellant relies upon *Nashville, Chattanooga & St. Louis Railway* v. *Walters* (1935), 294 U. S. 405. The California Public

Utilities Commission held that under the exercise of the police power, "a state may regulate the crossings of railroads with its highways, and may require grade separations to be erected and maintained, apportioning the costs in the exercise of its sound discretion"; citing, *Erie Railroad Company* v. *Board of Public Utility Commissioners* (1920), 254 U. S. 394; *Chicago, Milwaukee and Saint Paul Railway Company* v. *Minneapolis* (1914), 232 U. S. 430; *Missouri Pacific Railway Company* v. *Omaha* (1914), 235 U. S. 121; and *Lehigh Valley Railroad Company* v. *Board of Public Utility Commissioners* (1928), 278 U. S. 24.

II

The Validity of a State Statute Is Not Involved in This Appeal

The assignment of errors and statement as to jurisdiction shows that appellant's attack is not upon the order of the California Public Utilities Commission authorizing the city to widen and increase the height of the existing underpass. Appellant's attack is confined to the condition therein that the cost of the improvement be allocated between the city and appellant in the manner stated. That portion of the order under attack by appellant is not legislative in character and is not a statute of the state within the meaning of section 1257(2) of Title 28 of the United States Code. Instead it is a judicial determination under the organic law of California.

The authorities relied on by appellant do not support its contention that the statute involved in this case is the order of the California Public Utilities Commission. In the first case cited, *Lake Erie & Western Railroad Co.* v. *Public Utilities Commission* (1919), 249 U. S. 422, the appeal by the railroad attacks an order of the Public Utilities Commission requiring it to restore a spur track to a grain

elevator, whereas in the case at bar the attack is directed only to the matter of allocating costs. The second case, *Live Oak Water Users' Association* v. *Railroad Commission of California* (1926), 269 U. S. 354, involved an order fixing rates for service, thereby prescribing a rule relating to future service supplied by the utility. The third case, *Hamilton* v. *Regents of the University of California* (1934), 293 U. S. 245, involved an order of the Regents requiring students to take military training. As stated by this Court, at page 258, speaking through Mr. Justice Butler, "the assailed order prescribes a rule of conduct and applies to all students belonging to the defined class." In the case at bar the order complained of does not have the essential characteristics necessary to meet the requirement of legislative character present in the foregoing cases cited by appellant.

In the language of *Ross* v. *Oregon* (1913), 227 U. S. 150, 163:

> "Of course, the ruling here in question was by an instrumentality of the state; but as its purpose was not to prescribe a new law for the future, but only to apply to a completed transaction laws which were in force at the time, it is quite plain that the ruling was a judicial act, and not an exercise of legislative authority. As was said in *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 226, 53 L. ed. 150, 158, 29 Sup. Ct. Rep. 67: 'A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future, and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.'"

Under California law the allocation of costs is a judicial determination made by the Public Utilities Commission.

Appellant alleged in its petition for writ of review in the

California Supreme Court that the "Public Utilities Commission of the State of California, was and now is an administrative and quasi-judicial tribunal, created and existing under and by virtue of Sections 22-24 inclusive of Article XII of the Constitution of the State of California and by virtue of the Public Utilities Code and Public Utilities Act of California." (Par. II, p. 2)

Appellant also stated at page 61 of its point and authorities attached to its petition for writ of review, that

> "* * * Admittedly the underpass structures have become inadequate for vehicular traffic on Washington Boulevard and because of faster traffic, more traffic, and larger, wider, and higher trucks there is danger that trucks may scrape the sides of the underpass structure, but the change in the use of highway and in the types of vehicles using it and faster traffic have created this danger, not the railway."

The situation presented in the case at bar is quite similar to that which was before the California Supreme Court in *Postal Telegraph-Cable Co.* v. *Railroad Commission* (1925), 197 Cal. 426. In that case the Postal Telegraph-Cable Co. made "application for a review of that portion of an order made by the Railroad Commission whereby petitioner was allowed one-half of the cost of relocating a portion of its telegraph line in certain areas in which it is closely paralleled by a high-power transmission line operated by the Pacific Gas and Electric Company, in order to prevent induction interferences to petitioner's telegraph line which, by reason of its close proximity to the power line of the Pacific Gas and Electric Company, renders induction unavoidable." In affirming the order it was said in part, commencing at page 435:

> "Neither is the right of the Commission to compel the petitioner to relocate its lines challenged. It is

conceded by petitioner that if the Commission had made an order requiring petitioner to relocate its lines and had assessed the power company with the entire cost of such relocation, it would have been a valid order and the Commission's authority in such a case would have been regularly pursued. In other words, the jurisdiction or power of the Commission to determine the question it had taken hold of depended—in the view of petitioner—upon whether it had acted wisely or unwisely in the determination of the issue submitted. Such, of course, cannot be the rule. Failure to make an equitable apportionment of costs would constitute nothing more than error of judgment."

* * * * *

"Said public utilities having failed to agree upon a division of the costs of the removal or relocation of a fractional portion of petitioner's telegraph line and the cost thereof being a joint charge against both within the provisions of section 36 of the Public Utilities Act, and the Commission having fixed the proportion of the cost to be borne by each at one-half of the total cost of said change, and inasmuch as it cannot be said that the Commission acted arbitrarily or oppressively in the premises, its order must be affirmed even if it should appear to us that the apportionment of costs in favor of the petitioner was not as large as we might have allowed, were we vested with jurisdiction to fix the amount." (pp. 438-439)

That the allocation of costs by the California Public Utilities Commission in a grade separation matter is a judicial determination is clear from the ruling of the California Supreme Court in *City of San Jose v. Railroad Commission* (1917), 175 Cal. 284. That case was before the California Court on certiorari to review an order of the Commission requiring a grade separation at a proposed street crossing. The City of San Jose conceded that if establishment of the crossing was proper there should be separation of grades, but attacked that portion of the order

apportioning the expense thereof, in part, upon the City of San Jose. The city claimed, in part, "that the Railroad Commission exceeded its authority and jurisdiction in determining that the City of San Jose should bear a proportion of the cost of this crossing." (p. 286) One of the arguments advanced by the city was, "that the statute does not in terms provide for service of process or notice of any sort upon the city or that the city's rights be examined at any hearing." In disposing of this contention it was said (pp. 290, 291):

> "* * * We do not regard the omission to provide definite process to bring the city before the commission at a hearing on the necessity for a safe crossing as being fatal to the acquirement of jurisdiction over the municipality by the commission. The latter is both a court and an administrative tribunal. As a judicial body it has by implication all the powers necessary for the exercise of its duty. The city of San Jose does not complain that it had no day in court. It had notice to appear; actually did appear and was heard upon issue joined and evidence produced; and it had opportunity for review of the judgment. But aside from the power to summon and hear parties in interest—one which is necessarily involved in the judicial authority enjoyed by the commission, section 53 of the Public Utilities Act confers upon it power to prescribe rules of practice and procedure."

That judicial powers have been deliberately conferred upon the California Public Utilities Commission was specifically declared by the California Supreme Court in the first case coming before it under the constitutional amendment providing for the commission, namely: *Pacific Telephone etc. Co.* v. *Eshelman* (1913), 166 Cal. 640, it being there said at page 650:

> "That judicial powers were with deliberation vested in the commission the language of the constitution and

of the legislative enactments following the constitution leave no doubt."

It is equally clear that what appellant refers to as a statute, the validity of which was assertedly drawn in question, is in fact a judicial determination, the correctness of which appellant challenges. Such being the case the appeal should be dismissed.

III

No Substantial Federal Question Is Presented

Appellant's sole reliance is upon *Nashville, Chattanooga & St. Louis Railway* v. *Walters* (*supra*), 294 U. S. 405. While appellant claims that the case is a departure from the earlier decisions of this Court, it is to be noted at the outset that the case cannot be so characterized. For, as stated on page 431, "no case involving like conditions has ever been found in any of the lower Federal courts; nor, excepting the case here under review, has any such been found among the decisions of the highest courts of any state." The grade separation there involved was required in order to provide an underpass for a new Federal-aid highway in a rural community of 1823 inhabitants located in a sparsely settled territory. There was little traffic on the highway. Five of the six trains operated daily each way passed between 10:00 o'clock P. M. and 6:00 o'clock A. M. when there was substantially no highway travel. The new highway and underpass were not for local transportation needs, but to serve as a link in the nation-wide system of super highways fostered by Congress in conjunction with the several states in the interest of commerce by motor vehicle. The existing grade crossing was not eliminated but remained to serve the local needs on the old street route. The trial court found that, "the decision to build this underpass, its location and construction was not in any proper sense

an exercise of the police power," and "did not involve an exercise of the police power any more than many other features of this project such as elimination of curves, grades, widening the pavement, *et cetera*."

The Tennessee statute involved authorized the State Highway Commission in its discretion to require the elimination of grade crossings in the interest of safety. But the statute, as pointed out by this Court (p. 412), "without conferring upon the Commission any discretion as to the proportion of the cost to be borne by the railroad requires the latter to pay in every case, one-half of the total cost of the separation of grades."

The trial Court held the statutory apportionment of costs unconstitutional under the special facts of the case. On appeal, the Supreme Court of Tennessee, as pointed out at page 414, "declined to consider the special facts relied upon as showing that the order and statute as applied were arbitrary and unreasonable; and did not pass upon the question whether the evidence sustained those findings." This Court declined to pass upon the sufficiency of the foregoing facts to sustain appellant's contention that the statute and order based thereon were arbitrary and unreasonable. The holding of this Court in that case was (p. 428):

> "The Supreme Court of Tennessee erred in refusing to consider whether the facts relied upon by the Railway established as arbitrary and unreasonable the imposition upon it of one-half the cost of the underpass. The promotion of public convenience will not justify requiring for a railroad, any more than of others, the expenditure of money, unless it can be shown that a duty to provide the particular convenience rests upon it."

The opinion goes on to state that, "state action imposing upon a railroad the cost of eliminating a dangerous grade crossing of an existing street may be valid although it

appears that the improvement benefits commercial highway users who make no contribution toward its cost." The qualification of this general rule which was possibly applicable to the facts in the *Nashville* case is stated as follows (pp. 430, 431):

> "But in every case in which this Court has sustained the imposition, the new highway was an incident of the growth or development of the municipality in which it was located. * * * And in every such case the municipality apparently bore the cost of constructing the new highway for which grade separation was required."

The case at bar does not have any of the aspects which would bring it within the limitation upon the general rule of liability announced in the *Nashville* case.

The California Public Utilities Commission states in its opinion on rehearing—and the record clearly supports it:

> "The grade separations are in the City in an area which constitutes one of the principal industrial districts. * * * In the instant case, the proposed widening of Washington Boulevard is to meet local transportation needs, and the City's contribution thereto must come entirely from local funds." [Appendix B, pp. 35, 46, Appl. Statement as to Jurisdiction]

The grade separation here involved is now accomplished by two structures carrying the railroad tracks, one built in 1914 and the other in 1926, which provide a roadway only 20 feet wide with no facilities for pedestrian travel through the underpass, and according to the specific admission of appellant, "have become inadequate for vehicular traffic on Washington Boulevard and because of faster traffic, more traffic, and larger, wider, and higher trucks there is

danger that trucks may scrape the sides of the underpass structure" (Pts. & Auth. Pet. for Writ of Review, p. 61).

That the exercise of the police power in its truest sense is involved in authorizing the removal of such structures is too patent to warrant any argument upon the proposition. Appellant says, "the change in the use of highway and in the types of the vehicles using it and faster traffic have created this danger, not the railway" (p. 61). The danger referred to is not the danger of colliding with a train, but colliding with a structure maintained within the street easement to support the railroad facilities. And, most significant of all is the obvious fact that the dangerous condition created by the present structures is also a natural incident to the growth and development of the City, and accords fully with the situations presented in the cases referred to by this Court at page 430 of the *Nashville* decision.

It may properly be said that the crux of the case at bar is simply the matter of requiring the appellant to remove its permanent structures located within the street easement, which constitute a hazard and impediment to the primary use of the street easement, namely for public travel.

The vice of appellant's reliance upon the remarks of Mr. Justice Brandeis in the *Nashville* case relative to changed conditions no longer warranting the imposition of costs for grade separations upon the railroad is that those remarks were directed to the Federal-aid highway system and the Federal legislative scheme for the furtherance of this new facility for through transportation. This is a matter wholly foreign to the case at bar. The case at bar comes squarely within the concession referred to in the *Nashville* case (p. 413) that, "the rule has long been settled that, ordinarily, the State may, under its police power, impose upon a railroad the whole cost of eliminating a grade crossing,

or such part thereof, as it deems appropriate"; reference being made in the footnote to sixteen decisions.

The *Nashville* case is not a reconsideration by this Court of the problem of grade separation after a long interval of time elapsing since its prior consideration of the question. In 1931 this Court considered the matter collaterally in affirming judgments of the California Supreme Court affirming an order of the California Railroad Commission requiring the construction of a union passenger station in Los Angeles, it being said in *Atchison, Topeka & Santa Fe Railway Co.* v. *Railroad Commission* (1931), 283 U. S. 380, concerning railroads: (p. 395)

> "They may be required at their own expense to construct bridges or viaducts whenever the elimination of grade crossings may reasonably be insisted upon, whether constructed before or after the building of the railroads."

The case at bar is an illustration of the true exercise of the police power justifying the exaction of uncompensated obedience by appellant and in no sense involves an improvement for the special benefit of any particular segment of the public of the nature involved in the *Nashville* case. This being so, appellant's persistent claim of arbitrary apportionment of costs not in consonance with benefits finds no support in any decision of this Court, and, in fact, raises no question that is not firmly foreclosed by the prior decisions of this Court.

Conclusion

Upon the foregoing, Appellee City of Los Angeles respectfully moves that the within appeal be dismissed or that the judgment and decree of the Supreme Court of the State of California be affirmed.

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IN THE

Supreme Court of the United States

October Term 1953

No. 22

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,

Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and CITY OF LOS ANGELES,

Appellees.

Appeal From the Supreme Court of California.

BRIEF OF APPELLEE CITY OF LOS ANGELES.

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Appellees.

Appeal From the Supreme Court of California.

BRIEF OF APPELLEE CITY OF LOS ANGELES.

Foreword.

The City of Los Angeles, one of the appellees in the above-entitled cause, files this separate brief in reply to that portion of the joint brief for appellants filed in this case and in *Southern Pacific Co. v. Public Utilities Commission*, No. 43, for the following reasons:

1. The factual situation in the two cases is entirely different. The basis of appellant's obligation in the case at bar is obscured and minimized by the method adopted

by appellants in presenting their respective cases by unsupported and unfounded generalizations asserted in their joint brief. This case does not involve the elimination of an existing grade crossing as in the *Southern Pacific Company* case No. 43. This case involves the elimination of obstructions in one of the main thoroughfares of the city in one of its principal industrial districts, which provide an opening of only twenty feet for vehicular traffic beneath the Santa Fe tracks, despite the fact that the street easement at this point is ninety feet in width.

2. In this case the facts are that the cost of making a necessary improvement in a city street is $812,765, of which amount $701,015 is due to the presence of railroad structures within the public street easement. Under the order here involved, the Railroad would pay only $284,677.50, thus imposing a net cost on the City of $417,337.50, for the privilege of removing the railroad structures now within the street easement and rebuilding them with modern structures designed to permit the City to use its presently needed full street easement without interference with operation of the Railroad.

3. The City of Los Angeles was the applicant who filed the petition for the order of the California Public Utilities Commission which gives rise to this appeal and the City was made a party respondent to the case in the Supreme Court of California. The City is also one of the named appellees on the appeal to this Honorable Court, and not in any secondary capacity or merely as a real party in interest, as intimated on page 2 of the joint brief of appellants.

Statement of the Case.

The record made before the California Public Utilities Commission is not before this Court. Its absence will be commented on further in discussing the jurisdictional question presented. However, enough appears to disclose that the basic and salient facts of the case fully warrant and sustain the order made by the Commission.

The opinion on rehearing of the California Public Utilities Commission [R. 116-130]* states:

> "The record discloses that Washington Boulevard is a public street extending from the westerly boundary of the City of Los Angeles at the Pacific Ocean in the Venice area, and easterly through the entire breadth of the City and then for a distance of several miles east of the easterly boundary of the City. The grade separations are in the City in an area which constitutes one of the principal industrial districts. Washington Boulevard throughout most of its length has a paved surface of at least 60 feet in width, with a few exceptions where the pavement width varies from 40 to 60 feet. At the site of the existing grade separations, here under consideration, the roadway narrows down to 20 feet in width, and the vertical clearance is between 13 feet and 14 feet. The City's easement at this point is 90 feet." [R. 118.] * * *
>
> "The City of Los Angeles further presented a land use map of Washington Boulevard between Alameda Street and Soto Street [Ex. No. 62 R. H.] tending to show that Washington Boulevard in the vicinity of the underpasses here in question is not a freeway but is used as an access street to the adjacent properties.

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*References are to pages of the Printed Transcript of Record.

"After a careful consideration of all of the evidence adduced herein, and in the light of the evidence adduced in the original hearings, having the benefit of the briefs and oral arguments which have been presented, we conclude to affirm our prior findings to the effect that there is a need for widening and increasing the height of the existing underpasses.

"We also find that the preferred plan of the City of Los Angeles, as set out in Exhibit No. 13, heretofore described, sets out the construction which would be most practicable and best meet the public safety, convenience and necessity in this matter." [R. 126.] * * *

"In the instant case, the proposed widening of Washington Boulevard is to meet local transportation needs, and the City's contribution thereto must come entirely from local funds." [R. 129-130.] * * *

"* * * The proposed structure would result in a new bridge to replace one that is 75 per cent depreciated, and the new bridge would conform to the recommended 'live loading' standards or *Cooper* ratings whereas the present structures do not.

"As previously pointed out herein, the estimated costs of the proposed structures which may be said to be attributable to the presence of the railroad tracks for two divided span bridges is $569,355. The remaining costs are clearly attributable to the paving and widening of the street. We find that this amount of $569,355 is the amount of costs which should be allocated in this proceeding.

"After a full consideration of all of the evidence, briefs and oral argument presented in this matter, we hereby find it to be in the public interest to authorize the widening and increasing of the height of the existing underpasses of Washington Boulevard and the Harbor Branch Line and the main line railroads of The Atchison, Topeka & Santa Fe Railway Company, in accordance with the preferred plan of the City of Los Angeles as previously described herein. We further find that The Atchison, Topeka & Santa Fe Railway Company shall bear fifty per cent (50%) of the said amount of $569,355, the costs to be allocated, hereinabove indicated, and the City of Los Angeles the remainder." [R. 130.]

Appellant, petitioner below, made no contention that enlargement of the existing underpasses is not needed. The question presented to the California Supreme Court related solely to the allocation of costs. That the issue was so limited in the Court below by appellant was clearly and succinctly stated in the first paragraph of the conclusion of its reply to the answer of the respondent Public Utilities Commission and the answer of the respondent City of Los Angeles, as follows:

"The issue here is not whether the Washington Boulevard grade separation should be enlarged, but solely whether Petitioner, or any other railroad in a like situation, should pay a share of the cost far exceeding any possible, or even arguable, benefits it might receive." [R. 252.]

In fact, appellant freely admitted the dangerous nature of the existing underpasses, it being said in its points and authorities attached to its petition for writ of review that:

> "The narrowness of the underpass structures creates a hazard, particularly to large trucks which may scrape the sides of the structures and to trucks taller than the vertical clearance. It is admitted that the evidence is sufficient to support a finding that the underpasses should be enlarged. * * *
>
> "Admittedly the underpass structures have become inadequate for vehicular traffic on Washington Boulevard and because of faster traffic, more traffic, and larger, wider, and higher trucks there is danger that trucks may scrape the sides of the underpass structure, but the change in the use of highway and in the types of vehicles using it and faster traffic have created this danger, not the railway." [R. 35 and 46.]

In the face of these previously admitted facts how can appellant characterize this accident hazard as *de minimus*, or does it now claim that an accident hazard is completely absent in this case? (See Joint Br. for Appellant, p. 78.)

Appellant's Allocated Costs Are Only 35% of the Total Cost of the Improvement and Only 40.6% of the Added Cost Occasioned by the Presence of the Railroad Structures.

As to the proportion of the cost assessed against appellant for removal of its obstructions to the free and proper use of Washington Boulevard, it is incorrect to claim, as asserted at page 4 of appellants' joint brief, that the commission assessed against appellant "one-half of the cost (estimated at $569,335) of reconstructing and enlarging,

from two to six lanes, the existing grade separations at the point where Washington Boulevard intersects appellant's railroad line in the City of Los Angeles." The truth of the matter is that $569,355 was determined by the commission to be "the estimated costs of the proposed structures which may be said to be attributable to the presence of the railroad tracks for two divided span bridges." [R. 130.] The Commission stated that "The remaining costs are clearly attributable to the paving and widening of the street." [R. 130.] The evidence of the total estimated cost of what appellant describes as reconstructing and enlarging from two to six lanes, the existing grade separations is stated by the Commission to be $812,765. [R. 121.] One-half of $569,355 is only 35% of the total estimated cost. That the equity of the situation shows that the City is the one who has cause to complain, not the railroad, is clear from the statement of the Commission that:

> "Of the above amounts it was estimated that all of the cost of the bridges, walls and slopes, amounting to $575,105, and slightly more than one-third of the cost of the storm drain and street work, amounting to $125,910, or a total of $701,015, were costs necessitated by the presence of the railway. In other words, the cost to the City, if the railroad were not present, would be as follows:
>
> | | |
> |---|---|
> | Storm drain | $50,900 |
> | Street work | 48,660 |
> | Sewer | 10,350 |
> | Traffic safety devices | 1,840 |
> | | $111,750." [R. 122.] |

In short, for an estimated cost of $111,750 the desired and necessary improvement to Washington Boulevard could be made at the place in question, but because of the presence of the railroad, the estimated cost is $812,765 or an increase of $701,015 to the City, only $284,677.50 or 40.6% of which is to be borne by the railroad, leaving a net *cost to the City of $417,337.50 for the privilege of removing the existing structural facilities of the railroad within the street easement which obstruct the free and present necessary use of the city street.* And, incredulous as it may seem, appellant complains that it is being denied equal protection of the law, that its property is being taken without due process of law and for public use without just compensation and that interstate commerce will be subjected to an undue and unreasonable burden.

The factual statements recited in the opinion of the California Public Utilities Commission are not directly or specifically attacked by appellant. However, in order to bring to the attention of the Court so much of the proceedings before the Commission as appear in the record which clearly show the fairness of the Commission's opinion, there is attached to this brief, as an appendix thereto, a summary of matters before the Commission which amply supports the appraisal by that body of the real factual situation presented in this case and the issues it was called upon to decide.

Questions Presented.

It appears that the questions presented are as follows:

1. Is an order of a public utilities commission allocating costs for enlarging existing grade separation structures made after notice and hearing subject to attack either on appeal or by certiorari in the absence of the record made before the commission and upon which it acted?

2. If a railroad is forced to pay a substantial part of the cost of altering or enlarging its grade separation structures located within a street easement in order to remove the obstruction therein so as to permit the free and presently necessary use of the street for purposes of travel, must there appear to be a corresponding benefit to the railroad in its operations substantially commensurate with the amount the railroad it forced to pay in order to avoid

(a) Taking the railroad's property for public use without just compensation in violation of the due process clause of the Fourteenth Amendment;

(b) Depriving the railroad of its property without due process of law and denying it the equal protection of the law in violation of the Fourteenth Amendment;

(c) Imposing undue and unreasonable burdens upon interstate commerce in violation of the commerce clause contained in paragraph 3, Section 8, Article I of the Constitution of the United States or any paramount Federal statute?

Summary of Argument.

1. Since in a case of this nature the attack must be upon the order of the California Public Utilities Commission, the assignments of error on the part of the California Supreme Court in affirming the order do not present questions which may be decided on appeal from the judgment of that Court and the appeal should be dismissed. (*Live Oak Water Users Association v. Railroad Commission* (1926), 260 U. S. 354, 357.)

2. As the record made before the Commission upon which the order involved in this case is based is not before this Court, the order of the California Public Utilities Commission cannot be reviewed either on appeal or on certiorari because even if the order in its finality be considered as legislative-administrative in character, yet under the California constitutional provisions empowering the Commission to act, the ordained procedure by which this result is to be achieved is strictly judicial. (*Pacific Telephone and Telegraph Company v. Eshleman* (1913), 166 Cal. 640, 650, 137 Pac. 1119.)

3. Appellant's structures upon which its present overhead crossing is supported being located within an existing street easement and which are required to be eliminated in order to remove obstructions to the free use of the street easement by the public to the extent required under presently existing conditions, appellant has no property right therein which will support any claim of violation of either the due process or equal protection clauses

of the Fourteenth Amendment or undue burden upon interstate commeree.

4. Appellant asserts that "during the horse and buggy era" imposition upon the railroads of the full cost of construction of grade separations was upheld on the theory that the railroad was responsible for the danger to intermittent traffic and could be required under the state's police power to eliminate the danger incident to rail operations; but that there have been revolutionary changes in transportation in recent years, brought about by the widespread use of motor vehicles. Now, vehicular traffic is the chief beneficiary of grade separations, the modern purpose being the furtherance of uninterrupted rapid movement by motor vehicles, the railroad's principal competitor. Grade separations are now simply "public improvements" built for public benefit. Therefore, the railroads may not be compelled to contribute to the cost thereof in excess of an amount which represents a fair estimate of the benefits it will receive therefrom.

To the foregoing argument, this appellee replies:

(a) The danger to the increased vehicular traffic of today is just as great from railroad grade crossings as it was to the "horse and buggy" of the past and is now more wide spread because of the increased number of vehicles on the streets and highways, *a fortiori*, today, the reasonable exercise of the police power will still warrant the same imposition upon the railroad of the cost of grade separations as it did in the past.

(b) Whatever the reason for grade separations in other cases may be, in this case appellant is maintaining within the street easement owned by the City an obstruction upon which the railroad supports its existing overhead crossing structures across Washington Boulevard *necessary to the operation of the railroad* and which not only impedes vehicular traffic by providing only a twenty-foot opening with impaired clearance and without sidewalk facilities for pedestrians in a ninety-foot street easement in one of the heaviest industrial areas of the city, but creates an admitted hazard to the safe use of the street.

(c) The order of the Public Utilities Commission for the alteration of the existing grade separation is not a public improvement for the special benefit of any particular class of property or persons which would limit the allocation of the cost therefor to special benefit received, but is for the benefit of the general public. Further, it requires the railroad to pay only 35% of the total cost of the improvement, or 40.6% of the *added cost* to the City for the improvement, which would be absent if the railroad obstructions were not in the street easement at the present time.

ARGUMENT

A considerable portion of the argument in the joint brief for appellants has no particular application to the facts relating to the alteration of the railroad structures providing the overhead crossing on Washington Boulevard. Accordingly, those portions of appellant's argument are passed without comment in this brief. However, the absence of reply thereto is not to be taken as acquiescence therein or agreement therewith on the part of this appellee.

POINT I.

Appellant's Specification of Errors Based on the Judgment of the California Court Does Not Support an Appeal to the Supreme Court of the United States.

Appellant's specification of errors set forth on pages 12 and 13 of the joint brief for appellants is directed to an attack upon the judgment of the Supreme Court of California, it being asserted that the Court erred in failing to hold in the particulars noted. The question on appeal can only be whether the order of the Public Utilities Commission violates constitutional rights and immunities. The judgment of the Court below in failing to so hold is not the subject of attack on appeal to this Court.

In *Live Oak Water Users Association v. Railroad Commission* (1926), 269 U. S. 354, the Supreme Court of California affirmed an order of the California Railroad Commission (predecessor of the Public Utilities Com-

mission) fixing water rates and the case was brought before this Court on a writ of error. In dismissing the writ it was said at page 357:

> "The brief for plaintiffs in error declares: 'The plaintiffs in error maintain that by the judgment of the supreme court of California the obligations of their contracts have been impaired, that their property has been taken without due process of law, that they have been denied the equal protection of the laws, and that the California court has denied and renounced its power to protect the plaintiffs in error in their claims of rights, privileges and immunities secured by the Constitution of the United States.' This statement shows no jurisdiction here under the writ of error although it specifies a Federal question justiciable by certiorari. Something more than a claim of Federal right is necessary; the attack must be upon the validity of the order, not merely upon the court's judgment."

In the case at bar appellant freely admits its existing structures constitute a hazard to the traveling public making use of the street. It does not question the authority of the California Public Utilities Commission to entertain an application for the elimination of this hazard and to order alteration and enlargement of the structures needed for appellant's overhead crossing of the street. All that appellant is complaining about is the proportion of the costs allocated to it, claiming that it is violative of the due process and equal protection guaranteed by the Fourteenth Amendment and unduly burdens interstate commerce. In short, appellant is not attacking the validity of a statute, if it be a statute, appellant is setting up a claimed right, privilege or immunity under the Constitution of the United States. Is this not a matter to

be reviewed by certiorari under paragraph (3) of section 1257 of Title 28, United States Code, and not under paragraph (2) of that section, by appeal? Certiorari appears to be the proper method of review under the circumstances, and not by appeal. (*Dana v. Dana* (1919), 250 U. S. 220, 222.)

POINT II.

The Record Before This Court Does Not Permit a Review of the Order of the Commission on Certiorari.

Appellant contends that "even if it were to be assumed that the certiorari route should have been followed, the Court would treat the appeal papers in these cases as petitions for writs of certiorari," citing Title 28, United States Code, section 2103. (Joint Br. for Appellants, p. 80.) But, how can the papers on appeal be treated as a petition for certiorari if insufficient for that purpose. The difficulty with this suggestion is that the record made at the hearing before the commission and upon which the order complained of is based is not before this Court. Unlike a statute or ordinance adopted by a legislative body, the order of the Public Utilities Commission was by compulsion of the California Constitution, the result of a strictly judicial hearing.

As stated in *Pacific Telephone and Telegraph Company v. Eshleman* (1913), 166 Cal. 640, 650, 137 Pac. 1119, 1122:

> ". . . While without quoting, a reading of sections 22 and 23 of Article XII of the constitution and of sections 53 to 81 of the Public Utilities Act will establish beyond doubt that the railroad com-

mission is empowered to sit, and in the performance of its most important duties must sit, as a tribunal exercising judicial functions of great moment. It may be said that the final order of the commission in many instances is legislative-administrative in character, but none the less the ordained procedure by which this result is to be reached, the determination of controverted facts between private litigants and disputants, and the decision upon these controverted matters, are strictly judicial. (*Robinson v. Sacramento*, 16 Cal. 208; *Imperial Water Co. v. Board of Supervisors*, 162 Cal. 14 [120 Pac. 780].)"

The same thought was expressed in *City of San Jose v. Railroad Commission* (1917), 175 Cal. 284, 165 Pac. 967. In answer to the city's contention that the Public Utilities Act did not in terms provide for service of process or notice or that the city's rights be examined at any hearing, it was there said at pages 290 and 291 (Pac. p. 969):

". . . We do not regard the omission to provide definite process to bring the city before the commission at a hearing on the necessity for a safe crossing as being fatal to the acquirement of jurisdiction over the municipality by the commission. The latter is both a court and an administrative tribunal. As a judicial body it has by implication all the powers necessary for the exercise of its duty. The city of San Jose does not complain that it had no day in court. It had notice to appear; actually did appear and was heard upon issue joined and evidence pro-

duced; and it had opportunity for review of the judgment. But aside from the power to summon and hear parties in interest—one which is necessarily involved in the judicial authority enjoyed by the commission, section 53 of the Public Utilities Act confers upon it power to prescribe rules of practice and procedure."

It being "now settled that a utility has no right to relitigate factual questions on the ground that constitutional rights are involved" (*Alabama Public Service Com. v. Southern Railway Co.* (1951), 341 U. S. 341, 348), appellant cannot be heard to relitigate before this Court its contentions upon so much of the record made before the Public Utilities Commission as may be included in the appeal papers. Moreover, as this appellee views the question before this Court, it is not whether the *Commission* correctly weighed the evidence or correctly or incorrectly arrived at its decision, but, rather, whether *upon the facts before it,* its order violates any constitutional rights of appellant. How can a determination be made that such is the case without a review of the record before the commission? As far as the portions of the record which appellant submitted to the California Supreme Court are concerned, there was ample ground for sustaining the action of the commission, and, therefore, there was nothing for that Court to do but affirm the order of the commission.

POINT III.

Appellant May Not Rely Upon the Face of the Public Utilities Commission Order as Showing Impairment of Appellant's Asserted Constitutional Rights, as Its Validity Depends Upon the Facts of the Particular Case.

If appellant contends that the face of the opinion and decision of the California Public Utilities Commission furnishes sufficient ground for determining that the allocation of costs is unreasonable and therefore void, such contention is contrary to *Nashville, Chattanooga & St. Louis Railway v. Walters* (1935), 294 U. S. 405, the case upon which appellant so strongly relies. There, this Court noted a long list of decisions supporting the conceded premise of appellant therein that (p. 413):

> ". . . the rule has long been settled that, ordinarily, the State may, under its police power, impose upon a railroad the whole cost of eliminating a grade crossing, or such part thereof, as it deems appropriate."

This Court also pointed out that (p. 429):

> "It is true that the police power embraces regulations designed to promote public convenience or the general welfare, and not merely those in the interest of public health, safety and morals."

And further pointed out that (p. 430):

> "It is also true that state action imposing upon a railroad the cost of eliminating a dangerous grade crossing of an existing street may be valid although

it appears that the improvement benefits commercial highway users who make no contribution toward its cost. *Chicago, B. & Q. R. Co. v. Nebraska*, 170 U. S. 57, 75, 42 L. ed. 948, 954, 18 S. Ct. 513; *Missouri P. R. Co. v. Omaha*, 235 U. S. 121, 59 L. ed. 157, 35 S. Ct. 82, that a railroad has no constitutional immunity from having to contribute to the cost of safeguarding a crossing with another railway line, merely because the first railroad was built before the crossing was made; *Detroit, F. W. & B. I. R. Co. v. Osborn*, 189 U. S. 383, 47 L. ed. 860, 23 S. Ct. 540; *Northern P. R. Co. v. Puget Sound & W. H. R. Co.*, 250 U. S. 332, 63 L. ed. 1013, 39 S. Ct. 474, and that the State may, under some circumstances, impose upon a railroad the cost of the grade separation for a new highway. But in every case in which this Court has sustained the imposition, the new highway was an incident of the growth or development of the municipality in which it was located. *Northern P. R. Co. v. Minnesota*, 208 U. S. 583, 592, 52 L. ed. 630, 634, 28 S. Ct. 341; *Cincinnati, I. & W. R. Co. v. Connersville*, 218 U. S. 336, 54 L. ed. 1060, 31 S. Ct. 43, 20 Ann. Cas. 1206; *Chicago M. & St. P. R. Co. v. Minneapolis*, 232 U. S. 430, 58 L. ed. 671, 34 S. Ct. 400; *Erie R. Co. v. Public Utility Comrs.*, 254 U. S. 394, 409, 65 L. ed. 322, 333, 41 S. Ct. 169, P. U. R. 1921C, 143. Compare *Atlantic Coast Line R. Co. v. Goldsboro*, 232 U. S. 548, 554, 58 L. ed. 721, 725, 34 S. Ct. 364. And in every such case the municipality apparently bore the cost of constructing the new highway for which grade separation was required."

Comparing the face of the Commission's opinion on rehearing and its decision with clearly recognized instances, mentioned in the foregoing case, in which a railroad may be compelled to do far more than appellant is ordered to do in the instant case, it follows that if any invalidity is involved it must be solely by virtue of the *facts* of the case upon which the Commission's order was based.

The facts upon which the order complained of is based were fully presented to the Public Utilities Commission upon a judicial hearing, and the Supreme Court by denial of appellant's petition for writ of review in effect affirmed the order upon the merits as stated by appellant at page 2, footnote 1, of the joint brief for appellants, to which may be added, citation of the case of *Southern California Edison Co. v. Railroad Commission* (1936), 6 Cal. 2d 737, 59 P. 2d 1277. The affirmance by the Supreme Court of California being upon so much of the record before the Public Utilities Commission as appellant chose to submit in support of its petition plus, possibly, "the special knowledge of local conditions possessed by the State tribunals" which this Court in the *Nashville* case recognized "may be of great weight" (204 U. S. at p. 433), how can this Court review the order made by the commission to determine whether the facts adduced at the judicial hearing before the commission do not support the order, the record of the hearing before the commission being absent?

In concluding discussion of procedural problems a word seems appropriate in reply to appellant's assertion at pages 82 and 83 of appellants' joint brief that an attack upon the propriety of the allocation of costs involves a statute as far as jurisdiction of this Court *on appeal* is concerned. Appellant claims that "the very question here raised by the appellee cities was answered by this Court" in *Grand Trunk Western Ry. Co. v. Railroad Commission* (1911), 221 U. S. 400. This does not appear to be the fact. In the case cited, the question was whether the commission's order was a law of the state within the constitutional prohibition against the impairment of contracts, not whether the jurisdiction of this Court was properly invoked on appeal. That question does not appear to have been raised in the case.

Where the question raised is whether the impairment of the contract is by a law of the state, the question is whether the effect of official action is *equivalent to a statute of the state.* (*Appleby v. Delaney* (1926), 271 U. S. 403, 409.) While not ordinarily so, even the judgment of a state court may, under some circumstances, be construed as a law of the state in determining if contract rights have been impaired. (See *Columbia Ry. Gas & Electric Co. v. South Carolina* (1923), 261 U. S. 236, 244.)

POINT IV.

Appellant's Structures Being Within the Street Easement Appellant Has No Property Right in the Continued Maintenance of Such Structures Which Will Support a Constitutional Right to Compensation for Their Necessary Removal or Relocation in the Public Interest.

The street easement in which appellant's structures supporting its present overhead rail crossing is located was acquired by the City of Los Angeles by condemnation and by negotiation. [R. 152.] *Appellant does not assert that it has any vested property right, reserved by deed or judgment, superior to that of the City's easement for street purposes.* Appellant has not asserted what the nature of its claimed property right is that requires appellant to be compensated for the enforced removal of its structures from the street easement in the public interest. At most appellant can only be the holder of some type of franchise which permits it to make a secondary use of the street easement for location of its permanent structures therein.

It has long been the law, and so declared by this Court subsequent to its decision in the *Nashville* case, that the holder of a franchise or easement for public utility structures in a street must remove or relocate the same without compensation when reasonably necessary for the needed public primary use of the street.

The rule, its long standing, and its limitations even as to acquired easements, were discussed in *Panhandle Eastern Pipe Line Co. v. State Highway Com.* (1935), 294 U. S. 613, decided April 1, 1935, less than a month after the *Nashville* case. Unlike appellant in the case

at bar, the *Panhandle Eastern Pipe Line Company* had previously acquired easements from private land owners *which were not acquired* by the highway commission for the contemplated highway improvement consisting of new highways crossing the pipe line right of way at six widely separated places. "Plans for the new highways called for material changes in the pipe and telephone lines at the crossings—removals, lowerings, easements—estimated to cost above $5,000" (p. 616). The Kansas Highway Commission ordered the changes to be made and, upon the company's refusal without payment therefor, secured a writ of mandate compelling performance of the order without compensation. On appeal to this Court appellant challenged the validity of the statute upon the authority of which the commission's order was made. In reversing the judgment of the Supreme Court of Kansas, this Court pointed out that "a private right of way is an easement and is land" which ordinarily cannot be taken without compensation (p. 618). And, in the course of differentiating between pipe lines beneath a street and railroad crossings specifically stated *without a qualification existing by reason of the Nashville case* (pp. 620, 621):

> " 'The company must be deemed to have laid its tracks within the corporate limits of the city subject to the condition—not, it is true, expressed, but necessarily implied—that new streets of the city might be opened and extended from time to time across its tracks as the public convenience required, and under such restrictions as might be prescribed by statute . . . The plaintiff in error took its charter subject to the power of the State to provide for the safety of the public, in so far as the safety of the lives and persons of the people were in-

volved in the operation of the railroad. The company laid its tracks subject to the condition necessarily implied that their use could be so regulated by competent authority as to insure the public safety.' *Chicago, B. & Q. R. Co. v. Chicago,* 166 U. S. 226, 250, 252, 41 L. ed. 979, 989, 990, 17 S. Ct. 581.

" 'The railway company accepted its franchise from the state, subject necessarily to the condition that it would conform at its own expense to any regulations not arbitrary in their character, as to the opening or use of streets, which had for their object the safety of the public, or the promotion of the public convenience, and which might, from time to time, be established by the municipality, when proceeding under legislative authority—within whose limits the company's business was conducted.' *Cincinnati, I. & W. R. Co. v. Connersville,* 218 U. S. 336, 343, 54 L. ed. 1060, 1064, 31 S. Ct. 93, 20 Ann. Cas. 1206; *Chicago, M. & St. P. R. Co. v. Minneapolis,* 232 U. S. 430, 440, 58 L. ed. 671, 675, 34 S. Ct. 400.

"*Erie R. Co. v. Public Utility Comrs.,* 254 U. S. 394, 65 L. ed. 322, 41 S. Ct. 169, P. U. R. 1921C, 143, *supra,* opinion by Mr. Justice Holmes, goes upon the theory that it could be reasonably said that public safety required the changes, and that the order of the Commission 'should be regarded as stating a condition that must be complied with if the company continues to use' the soil. Also, 'the authority of the railroads to project their moving masses across thoroughfares must be taken to be subject to the implied limitation that it may be cut down whenever and so far as the safety of the public requires.'

* * * * * * * *

"The rule in respect of railroad crossings applies when there is substantial risk of injury to the

public from the operation of trains, and ground to imply the company's consent to take such measures as may be necessary to prevent the hazard. This Court has not sanctioned extension of the rule to wholly dissimilar circumstances; it does not apply to structures which are unattended by serious danger to the public."

The further qualification expressed in the *Panhandle Eastern* case (p. 621) upon authority of *Pennsylvania Coal Co. v. Mahon,* 260 U. S. 393, that:

> "The rights of the public in a street purchased or laid out by eminent domain are those that it has paid for. If in any case its representatives have been so short sighted as to acquire surface rights without right of support we see no more authority for supplying the latter without compensation than there was for taking the right of way in the first place and refusing to pay for it because the public wanted it very much,"

has no application to this case as appellant is not contending that it has any property right by deed or judgment to which the City's title for street purposes is subject or subordinate.

Moreover, on a straight franchise right basis, the rule as to removal of structures without compensation when necessary in the public interest as originally announced in *New Orleans Gaslight Co. v. Drainage Commission,* 197 U. S. 453, is held in the *Panhandle* case (p. 622), to still be the rule, despite the *Nashville* case.

It follows therefore that, under the facts of the case at bar, it does not appear that appellant has any property right involved upon which it can predicate an assertion of the protection of the Constitution of the United States.

POINT V.

The Danger to the Traveling Public on the Highway Today Is Just as Great as It Was at the Railroad Grade Crossing "During the Horse and Buggy Era" and More People Are Exposed to Such Danger Than in the Past.

Appellant at page 32 of the joint brief for appellants under the subtitle, in quotes, "The Revolutionary Changes Incident to Transportation Wrought in Recent Years by the Introduction of Motor Vehicles" states:

> "The 'horse and buggy' days are receding rapidly from the memories of men into the pages of history. But to those who remember the days when the automobile was a new and rare object, the changes brought about by the automobile, the truck and the bus are awe-inspiring."

Appellant then refers to the superiority of rail transportation in those days and states (p. 32):

> "It was upon the 'particular facts' pertinent to this era that this Court upheld state action requiring the railroads to pay the entire cost of building grade separations."

But what were the "particular facts" pertinent to that era? Appellant states at page 51 of the joint brief:

> "The fact that the accident hazard was the source of almost all agitation for separation of grades in the years preceding the 'transportation revolution,' and was the principal basis for assessing the cost against the railroad which created that danger, is clearly shown by the decisions of this Court and the courts of the several states approving such assessments."

How can it be argued that today the hazard has been diminished? Appellant at page 56 of the joint brief of appellants lists some eight asserted principal causes of grade crossing accidents, which, except for possibly substituting the mechanical warning device for the former flag man and the faulty car stalling on the track instead of the balky or frightened horse, are the same today as in the past.

To say, as appellant asserts at page 57 of the joint brief, that the intersection of a railroad line and a highway is no different from the point of view of safety, from the intersection of two highways is absurd.

What railroad can control its operations in conformity with traffic signals governing the movement of vehicular traffic on a highway? If there be one, it can have no bearing in this case because according to appellant's own witness before the Public Utilities Commission *a main line railroad could not operate under signalised or synchronised control of traffic, such as that under which vehicular traffic operates.* [R. 154.]

What appellant is really arguing is that it no longer enjoys a virtual monopoly in transportation and that therefore it should not be forced to stand any portion of the cost of making its crossings safe because it will benefit its competitors. But what right has the railroad to make a highway *unsafe* for its competitors or any other segment of the public? That is the real crux of appellant's argument and the premise upon which it is really premised. That it has no such right is self-evident and the fallacy of appellant's argument based upon this false assumption needs no comment. Safety to the public, today, as in the past, fully warrants the order of the California Public Utilities Commission complained of by appellant in the case at bar.

POINT VI.

Whatever the Reason for Grade Separations in Other Cases May Be, in This Case Appellant Is Maintaining Within the Street Easement Owned by the City an Obstruction Upon Which the Railroad Supports Its Existing Overhead Crossing Structures Across Washington Boulevard Which Not Only Impedes Vehicular Traffic by Providing Only a Twenty-foot Opening With Impaired Clearance and Without Sidewalk Facilities for Pedestrians in a Ninety-foot Street Easement in One of the Heaviest Industrial Areas of the City, but Creates an Admitted Hazard to the Safe Use of the Street, the Removal of Which Will Be of Substantial Benefit to All Segments of the Public.

Disregarding the facts of any other case, it appears from the available portions of the hearing before the California Public Utilities Commission, as established by appellant's own witnesses, the following:

> "Arthur C. Jenkins, protestant's witness, qualified as a consulting engineer with many years' experience in various phases of transportation problems." [R. 20.] * * *
>
> "Mr. Jenkins recognized that the railroads receive an advantage where the hazard to the train is eliminated by separation of grades; * * * that the railroads receive benefits from eliminating grade separations by eliminating delays; * * *
>
> "That railroads should be given priority at grade crossings because highway traffic is continuous whereas railroad operation is relatively infrequent, and because railroads would block more than one intersection if stops were made for traffic signals, and trains are too heavy to accelerate rapidly to

clear traffic signals following a complete stop." [R. 26.]

"That if the City put in a grade crossing over the tracks at Washington Boulevard, the Santa Fe would suffer a detriment, since a grade crossing presents a hazard—regardless of the type of protective devices there; that motor vehicles may crash even through automatic gates, which are the best type of protection; but the situation as it presently exists is no detriment to the railroad, because the grades are separated now;" [R. 28.]

"Frank H. Hitchcock, a witness for Santa Fe and the General Claims Agent at Los Angeles, testified that:" [R. 29.] * * *

"The hazard of damage to trains has increased many fold in recent years. Years ago trains seldom struck anything but a horse and buggy and pedestrians. Now tank trucks and heavy vehicles cause disastrous wrecks and derailments primarily due to the increased size and width and character of highway vehicles." [R. 30.] * * *

"The average accident with an automobile does not damage railroad equipment. Accidents with trucks, road rolling machines, and commercial-type vehicles do cause damage to railroad equipment." [R. 30.]

"O. L. Gray, General Manager for Santa Fe, testified that there are seventeen scheduled passenger train movements and sixteen to twenty-two freight train movements daily over Washington Boulevard." [R. 30.] * * *

"Freight trains over Washington vary in content from ten to one hundred cars. Their speed does not exceed fifteen miles per hour.

"There has been substantial increase in business in this area since 1900 freightwise but not passengerwise. Including military trains, Santa Fe trains carry 1,000 to 1,200 persons daily over Washington Boulevard.

"Crossing accidents cause considerable expense and delay. For example at Azusa a gasoline truck collided with the Super Chief doing approximately $150,000.00 damage including claim costs, and delayed the train about two hours.

"One crossing accident out of twenty-five or thirty may damage a train, the damage usually consisting of damage to foot boards or handholds or ladders. A small proportion of the accidents cause damage to other equipment. Perhaps one out of fifty or sixty accidents may cause a derailment." [R. 31.]

Mr. Jenkins, the Company witness, admitted that "there is no escaping that fact that railroad crossings constitute a hazard to life and property at the present time," and he also testified that "under present traffic conditions street traffic presents a hazard to trains, which was 'extremely serious,' and that the elimination of such hazard was an advantage to the train." Mr. Jenkins further testified that in computing benefits to the railroad resulting from grade separations, the delay factor should be given considerable weight and that a main line railroad could not operate under signalized or synchronized control of traffic, such as that under which vehicular traffic operates. [R. 153-154.]

Mr. Jenkins also testified that "there were heavy industries in the area here involved, and that there was local traffic from such industries using Washington Boulevard. Likewise he admitted that probably 100 percent

of all passenger traffic handled by railroads use city streets at some stage of their journey, so that city streets are feeders and used as feeders for the railroad business, and that a comparable situation largely exists with respect to freight, except that there is a larger percentage of freight served directly by spurs which do not involve truck connection." [R. 154.]

He likewise admitted that "the mere presence of a truck doesn't prove competition with a railroad, but instead the truck might be feeding the railroad, rather than competing with it." [R. 154.] He further admitted that "a crossing at grade would be a detriment to the railroad." [R. 154.]

Mr. Grey, another company witness, testified that "since 1900 there has been a very substantial increase in the business done by the Santa Fe, freightwise, over the lines using the tracks here involved; that where there is a series of tracks such as here involved, and assuming an automobile and train collision, there would be considerable expense and delay and disruption of scheduling, which would not be reflected in claim payments; that in some accidents considerable damage is done to the Santa Fe equipment, such as when a truck collided with the Super Chief, damaging Santa Fe equipment about $150,000 and relaying the train about two hours; that a serious delay influences movement of traffic in either direction, not only at the point of the accident but further on down the line; that the tonnage now handled over these tracks is up, even greater than in 1928 or 1929 when volume was very heavy; that the San Diego line, which uses these tracks, is a very good passenger earner; that the diesel locomotives now being used handle longer trains with more tonnage, which is a benefit to the railroad, and

the longer the train the better for the railroad, regardless of the fact that such longer trains would block grade crossings for a longer period of time." [R. 155.]

Taking this evidence in connection with the factual situation described in the opinion of the Public Utilities Commission, as heretofore set forth in the Statement of the Case, what more is needed to show the need for the alteration of the existing railroad structures across Washington Boulevard and the propriety of assessing at least a portion of the cost thereof to appellant?

On the facts presented before the Public Utilities Commission in the case at bar the decision of the Supreme Court of Illinois in *Chicago Junction Railway Co. v. Illinois Commerce Commission* (1952), 412 Ill. 579, 107 N. E. 2d 758, appears to amply support the Commission's order in this case and is a clear exposition of the proper application of the legal principles involved to modern conditions.

There, an order of the Illinois Commerce Commission, ordering the construction of a new overhead railroad crossing and apportioning the costs thereof, was affirmed in the light of the following facts stated in the opinion (p. 760):

> "The pertinent facts which were disclosed at the hearing showed that Ashland Avenue is a north and south public street in the city of Chicago, which has been widened from its original 80 feet to 100 feet for some nineteen miles, and the petition herein sought to eliminate one of the remaining narrow points in the street. The present forty-year-old bridge, which crosses Ashland Avenue between Thirty-ninth and Forty-first Streets, constricts the streets usable

width to some 64 feet, which is further narrowed to 44 feet at the actual point of passage under the bridge. * * * Ashland Avenue is designated as an interstate trucking route, and near the bridge in question there is a congested industrial and commercial area to and from which a great deal of traffic flows. Some 500 trains move over the bridge every day, and a traffic count on June 15, 1949, showed that more than 21,000 vehicles passed under the bridge in a 16-hour period. * * *

"Following the hearing, the commission found that the bridge in existence severely constricted the usable width of Ashland Avenue; that it was not sufficiently strong to support weights of trains which reasonably should use it; that public convenience and safety required its removal and replacement by a structure built to modern standards which would provide reasonable and adequate facilities for both highway and railroad purposes. The commission thereupon ordered that the cost of the replacement structure be paid 65 per cent by the petitioner, and 35 per cent by the railroads."

On a factual basis, it would be difficult to find better judicial authority, expressed in the light of modern conditions, so fully supporting the order of the California Public Utilities Commission made in the case at bar. As a Court having long experience with the problem, the decision of the Supreme Court of Illinois is certainly entitled to great weight. And, the foregoing case is a clear expression of judicial repudiation of the contentions of appellant relative to the *Nashville* case establishing a new principle applicable to situations similar to that involved in the case at bar.

POINT VII.

The Order of the Public Utilities Commission Is Not Repugnant to the Commerce Clause of the Constitution of the United States or Any Statute Enacted Under the Authority Thereof.

As stated by this Court in *Railway Express Agency v. New York* (1949), 336 U. S. 106, 112:

> "Where traffic control and the use of highways are involved and where there is no conflicting federal regulation, great leeway is allowed local authorities, even though the local regulation materially interferes with interstate commerce."

From what has heretofore been pointed out in this brief, the order of the Public Utilities Commission is not subject to attack upon the ground that it offends against the commerce clause as it "makes no discrimination against interstate commerce, will not impede its movement in regular course, and will affect it only incidentally and indirectly." (*Denver & Rio Grande Railroad Co. v. City and County of Denver* (1919), 250 U. S. 241, 246.)

Appellant's reliance upon asserted congressional declaration of policy affords no ground for attack upon the order. There is nothing in such declaration attempting to strike down the exercise by the states of the power here involved. As stated in *Southern Pacific Co. v. Arizona* (1945), 325 U. S. 761, 766:

> "The provisions under which the Commission purported to act, phrased in broad and general language, do not in terms deal with that subject. We do not gain either from their words or from the legislative history any hint that Congress in enacting them intended, apart from Commission action, to supersede

state laws regulating train lengths. We can hardly suppose that Congress, merely by conferring authority on the Commission to regulate car service in an 'emergency,' intended to restrict the exercise, otherwise lawful, of state power to regulate train lengths before the Commission finds an 'emergency' to exist.

"Congress, in enacting legislation within its constitutional authority over interstate commerce, will not be deemed to have intended to strike down a state statute designed to protect the health and safety of the public unless its purpose to do so is clearly manifested, . . . or unless the state law, in terms or in its practical administration, conflicts with the Act of Congress, or plainly and palpably infringes its policy."

Conclusion.

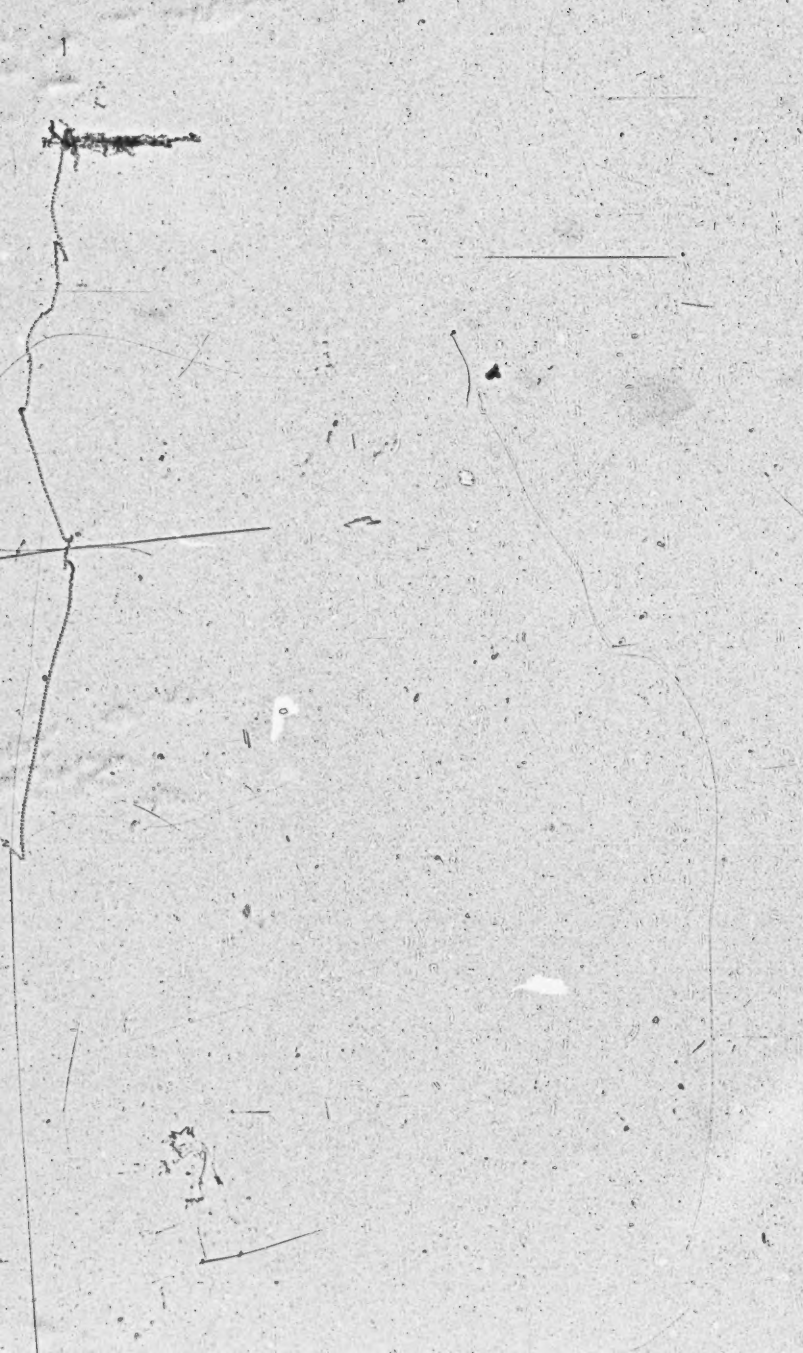
In conclusion, it is respectfully submitted that the appeal should be dismissed and certiorari be denied, or the judgment of the Supreme Court of California be affirmed.

Respectfully submitted,

ROGER ARNEBERGH,
City Attorney,

BOURKE JONES,
Assistant City Attorney,

Counsel for Appellee, City of Los Angeles.



APPENDIX.

Summary of Proceedings and Matter Before California Public Utilities Commission Which Sustain Its Order.

The petition for Writ of Review filed by appellant in the California Supreme Court and appendices thereto [R. 1-33] discloses that:

The Public Utilities Commission of the State of California, "was and now is an administrative and quasi-judicial tribunal." [R. 1.] "After public hearing and submission of points and authorities, the Commission, by its Decision No. 43374, dated October 4, 1949, authorized the City to enlarge the underpasses, further providing that the expense thereof was to be borne by the City, with the exception of the sum of $95,160.00 which was to be paid by the Santa Fe." [R. 2.] "Thereafter a rehearing was granted March 28, 1950, and public hearings were held thereon, followed by submission of points and authorities, and, on November 28, 1951, by oral argument before the Commission *en banc.*" [R. 2.] "On June 24, 1952, the Commission rendered its Decision No. 47344, the decision complained of." [R. 2.]

The nature and location of the underpasses and their history are alleged in Paragraph IV of the petition [R. 3] as follows:

"That the two underpasses herein concerned are located under the Santa Fe at Washington Boulevard, a principal East-West arterial highway across the City of Los Angeles, between Soto Street and Santa Fe Avenue. The railroad above the underpasses is near a junction of the Santa Fe's harbor line, consisting of a right-of-way

66 feet wide which was placed in operation on September 23, 1887; and one of Santa Fe's main lines to the East, consisting of a right-of-way 100 feet wide which was placed in operation on November 24, 1888.

"Prior to 1914, three tracks of the Santa Fe crossed the area now known as Washington Boulevard, at grade. There was no open street at or near the underpasses in the present location of Washington Boulevard. In 1914, pursuant to a contract between the City and Santa Fe, the two presently existing underpass structures, each 20 feet wide, approximately 200 feet apart, were constructed to give the City's garbage trucks easier access to a garbage disposal plant located east of the tracks. The City and Santa Fe by agreement each paid one-half of the costs thereof.

"Subsequent to the building of the railroad tracks the City acquired easements for street purposes, partly from Santa Fe, and in 1931 constructed a bridge across the Los Angeles River a short distance easterly of the underpasses, and opened up Washington Boulevard as an arterial street from the Pacific Ocean on the west to Whittier Boulevard, east of the City. In 1926, Santa Fe required for railroad purposes, and built at its sole expense, an additional super-structure and track to provide a second main line track. Thus each bridge over Washington Boulevard now carries two tracks."

Appendix "B" to the petition [R. 10-33] is represented to be "a summary of the voluminous record in this matter, consisting of a summary of the pertinent pleadings, testimony and exhibits." [R. 10.] In that portion designated as "Summary of Pleadings" it is

recited in part that the application of the City filed June 8. 1948, alleges,

"* * * that Washington Boulevard is a public street extending from the Pacific Ocean near Venice, Easterly, through the entire breadth of the City for a distance of several miles East of the City to Whittier Boulevard, traversing the principal industrial district of the Los Angeles Metropolitan Area; that if its usefulness were not impaired by the narrowness and limited vertical clearance of its underpasses, it could and would be one of the principal carriers of traffic to, from and within the industrial district. * * *

"That in 1914 there was very little motor traffic in the area, but since that time the City has grown immensely and the motor vehicle traffic, including commercial trucking, has increased enormously; and that the industrial district nearby has become one of the great industrial districts of the nation;

"That the underpasses, because of their narrowness and inadequate vertical clearance, constitute a hazardous impediment to traffic, and have caused many serious accidents and traffic congestions; that large commercial trucks can pass only at peril of sideswiping;

"That there is no bus transportation, although there is a public demand for it, because of the limitations of the underpasses; that persons who work in the area must travel by circuitous routes;

"That because of congestion, many motor vehicles, and particularly large trucks which would normally use Washington Boulevard, are diverted to other streets, resulting in loss of man and vehicle hours and increased expense of transportation;

"That for the above reasons, the public need, safety, welfare and convenience require that the underpasses be enlarged, and their height be increased." [R. 10-11.]

It is significant to note that appellant's summary of its answer does not dispute the foregoing allegations of the City's application. The gist of appellant's answer, as summarized at pages 11 and 12 of the Record, is that any need for wider structures is solely because of increase in vehicular traffic and not because of a need on the part of the railroad and that the cost of enlarging the existing underpasses should be borne by the City as no benefit will accrue to the railroad, but will compel it to defray the cost of maintaining larger bridges.

It is also to be noted that no claim of any right protected by either Federal or State Constitutions was asserted in appellant's answer filed with the Public Utilities Commission.

As recited in the opinion of the Public Utilities Commission rendered after the rehearing, the parties stipulated to the effect "that all evidence in the prior hearings in this matter, leading to Decision No. 43374, *supra*, be incorporated in this record." [R. 117.] This is the foundation for appellant's "Summary of the Evidence Taken At the Original Hearing and Considered as Part of the Evidence on the Rehearing by Stipulation Between the Parties," included in Appendix "B" to the petition for writ of review commencing on page 13 of the record. Under this portion of Appendix "B" to the petition it appears that:

H. F. Holley, applicant's witness, Assistant Chief Engineer of the Automobile Club of Southern California, testified that the need for the enlarged underpasses was

the result of increased vehicular traffic and that there is a tremendous flow of traffic on Washington Boulevard. [R. 13.] Howard P. Mason, applicant's witness and Secretary of the Metropolitan Traffic & Transit Committee of the Los Angeles Chamber of Commerce, testified to the increase in population and vehicle registration in Los Angeles. [R. 13.]

Ralph T. Dorsey, applicant's witness and Principal Traffic Engineer of the City, testified that "Exhibit 2 showed the amount of traffic using streets in the vicinity of the grade separations, the directional volume of such traffic, and the left and right turns made by the traffic."

He stated that "the existing underpasses are potentially and actually a hazardous condition"; he submitted "Exhibits 3 to 7, inclusive, depicting insufficient vertical clearance and inadequate horizontal clearance; that there is a record of some accidents there; traffic conditions would be relieved throughout the area by an adequate underpass." He recommended "the construction of a 3-lane underpass each way, each lane 11 feet wide, and at least one sidewalk."

Mr. Dorsey further testified that "a public benefit would result from widening the underpasses, for the reason that traffic would continue with less delay and that Washington Boulevard could be used as a feeder for new freeways; thus relieving parallel streets of a considerable burden; that a crosstown busline would be one of many public benefits, reducing traffic since the public would use a bus instead of their own automobiles; thus reducing hazards by reducing the number of automobiles used." [R. 14.]

K. Charles Bean, applicant's witness and Chief Engineer and General Manager of the Department of Public Utilities & Transportation of the City of Los Angeles, testified that "as long ago as 1939 it was recommended that a busline be inaugurated on East Washington Boulevard; that the Los Angeles Railway Company felt that such a line could not be of maximum benefit until there was a better way of crossing the Santa Fe, the existing underpasses being inadequate and constituting an unreasonable hazard for the operation of a busline—studies indicated sufficient patronage, and such a service would help other lines relieve congestion downtown, but could not operate successfully because of too much delay." [R. 14-15.]

Milton Breivogel, applicant's witness and Principal City Planner of the City, described the industrial area in the vicinity of East Washington Boulevard; he also testified concerning population and vehicle registration increases, giving the number of persons residing within a five and a ten mile radius of the underpass.

According to this witness, "all streets today are loaded with traffic, and more street capacity must be provided for vehicles, especially in the area involved, where public transportation would become increasingly important." [R. 14-15.]

Hugo H. Winter, recalled by applicant, testified that "it is feasible to widen the Los Angeles River bridge at moderate expense"; he recommended "construction of underpasses wider than 56 feet"; he described Washington Boulevard "as one of the very important traffic-carrying arteries leading across the City and into the County; traffic lanes of 9 feet are not now considered adequate; that 10 feet is a suitable minimum, especially on a high-

way like Washington Boulevard where there is a relatively heavy flow of truck traffic; that two roadways of 33 feet width are recommended; that the reason 9 foot lanes are insufficient is because cars and trucks have increased in width, and must take into account that they now travel faster; that it is proper to provide for pedestrian use of the street, although there are no sidewalks now existing between Santa Fe Avenue and Soto Street in Washington Boulevard." [R. 16.]

"* * * that City officials agreed that Washington Boulevard is one of the City's very important east-west thoroughfares, it carries tremendous traffic as far east as Alameda Street where it is improved; that east of Alameda Street there is a large open pit which prevents complete improvement on the permanent lines of the boulevard; that between Santa Fe Avenue and Soto Street are the narrow railroad Santa Fe underpasses which prevent the complete improvement of Washington Boulevard in that section; that there is a tremendous diversion of traffic between Alameda Street and Soto Street because of the inadequacy of the existing roadways in both sections." [R. 17.]

He testified that "trucks and mixed traffic make necessary the construction of wider traffic lanes; that the *prima facie* speed limit on Washington near the underpasses is 25 miles per hour; that the need for higher vertical clearances arises solely because of the height of trucks; that the existing underpass structures became inadequate when Washington Boulevard bridge was built across the river in 1931; that before Washington Boulevard was made a through street it simply handled traffic in and out of the garbage disposal plant and the City's maintenance yard; that when the City built the bridge

across the river there was a pressing need of opening up Washington Boulevard between Santa Fe Avenue and Soto Street, so that it could become a link in not only a cross-city but, also, a cross-county highway that was rapidly being developed."

Mr. Winter stated that "there is a provision being made to connect Washington Boulevard at Telegraph Road with the Santa Ana Freeway that is being constructed; that the delay factor is one of the large factors in establishing the need of these grade separations; that from the standpoint of benefit, the widening of the underpasses would furnish more traffic capacity, which is now diverted to other streets; that 10-foot traffic lanes are satisfactory except where there are curves or heavy truck traffic, and then 11-foot lanes are a desirable minimum; that buses are as wide as 104 inches; that truck maximum is generally 96 inches; and he estimated that if the railway did not cross Washington Boulevard the street could be widened to the desired width for $111,750, that the proposed underpass structures would cost $812,756.00, making the difference due to the presence of the railway $701,015.00." [R. 17-18.]

Ralph T. Dorsey, Principal Traffic Engineer of the City of Los Angeles, applicant's witness, further testified that "the percentage of trucks using East Washington Boulevard at the underpasses in 1950 was 9,474 passenger cars vs. 2,537 trucks, the ratio being approximately 26% trucks; that these trucks go generally either up the coast, to Sepulveda Boulevard, the Valley or the harbor; the center of gravity is Washington Boulevard and Alameda, and from there the trucks move in four directions; Washington and Alameda is the center in relation to industry and the harbor, and is the focal point

of truck traffic to the 'four winds and from the hinterland'; that if Washington Boulevard were widened, trucks and autos both would make more use of it; that Washington Boulevard underpasses are about 4,300 feet east of the intersection of Washington and Alameda."

Exhibit 27, introduced by this witness, shows "the results of a traffic delay check on Washington Boulevard west of the underpass." He said that "the largest percentage of trucks using Washington Boulevard are of a local nature; that the large trucks—or the greater percentage of them and the trailers, would be through traffic; the large trucks and the reefers come from the hinterland, bringing commodities to a point of distribution which centers at Washington and Alameda; from there they go to the four tradewinds—the harbor, industry and markets, and such. That on Alameda 38% of the traffic is trucks; it is the main truck artery in the City; that the large trucks that we are talking about are the ones that come from San Francisco or Portland, coming into the industrial area or harbor."

He testified that "if the underpasses under Santa Fe's tracks were enlarged, it was his opinion that more of the large trucks very definitely would use Washington Boulevard; that at the present time there is a large turning movement to avoid the underpasses on Washington Boulevard, trucks and auto traffic avoiding these underpasses." [R. 18-19.]

"Arthur C. Jenkins, protestant's witness, qualified as a consulting engineer with many years experience in various phases of transportation problems. [R. 20.] * * *

"Mr. Jenkins recognized that the railroads receive an advantage where the hazard to the train is eliminated by

separation of grades; said that it is difficult to pass on the cost of grade separations by increasing railroad rates, because if such rates were increased the trucks would have a competitive advantage and traffic would be diverted to them; that the railroads receive benefits from eliminating grade separations by eliminating delays; the delay factor can be measured as it was in the Goshen Junction case, pursuant to the Johanson formula developed in a textbook and showing the material value upon a delay to highway traffic; [R. 26.]

"That railroads should be given priority at grade crossings because highway traffic is continuous whereas railroad operation is relatively infrequent, and because railroads would block more than one intersection if stops were made for traffic signals, and trains are too heavy to accelerate rapidly to clear traffic signals following a complete stop." * * * [R. 26.]

"That if the City put in a grade crossing over the tracks at Washington Boulevard, the Santa Fe would suffer a detriment, since a grade crossing presents a hazard—regardless of the type of protective devices there; that motor vehicles may crash even through automatic gates, which are the best type of protection; but the situation as it presently exists is no detriment to the railroad, because the grades are separated now; [R. 28.]

Frank H. Hitchcock, the General Claims Agent at Los Angeles [R. 29], testifying for the Santa Fe stated that:

"The hazard of damage to trains has increased many fold in recent years. Years ago trains seldom struck anything but a horse and buggy and pedestrians. Now tank trucks and heavy vehicles cause disastrous wrecks and

derailments primarily due to the increased size and width and character of highway vehicles. [R. 30.] * * *

"The average accident with an automobile does not damage railroad equipment. Accidents with trucks, road rolling machines, and commercial-type vehicles do cause damage to railroad equipment." [R. 30.]

"O. L. Gray, General Manager for Santa Fe, testified that there are seventeen scheduled passenger train movements and sixteen to twenty-two freight train movements daily over Washington Boulevard. [R. 30.] * * *

"Freight trains over Washington vary in content from ten to one hundred cars. Their speed does not exceed fifteen miles per hour.

"There has been substantial increase in business in this area since 1900 freightwise but not passengerwise. Including military trains, Santa Fe trains carry 1,000 to 1,200 persons daily over Washington Boulevard.

"Crossing accidents cause considerable expense and delay. For example at Azusa a gasoline truck collided with the Super Chief doing approximately $150,000.00 damage including claim costs, and delayed the train about two hours.

"One crossing accident out of twenty-five or thirty may damage a train, the damage usually consisting of damage to foot boards or handholds or ladders. A small proportion of the accidents cause damage to other equipment. Perhaps one out of fifty or sixty accidents may cause a derailment." [R. 30-31.]

"George Langsner, East District Engineer in charge of Design in the Los Angeles Metropolitan Area, Division of Highways, testified that there will be a grade separation between the Santa Ana Freeway and Wash-

ington Boulevard; that Washington Boulevard is a so-called primary or major highway built to major highway standards.

"It is not good engineering practice to narrow a six-lane highway to two lanes or four lanes.

"Washington Boulevard carries approximately ten thousand cars and trucks a day. The underpasses under Santa Fe tracks are approximately five miles from the Anaheim-Telegraph-Washington Boulevard crossing." [R. 32-33.]

"Hugo H. Winters, recalled, testified that the accidents as shown by Exhibit 28 occur partly because of the tapering of the roadway from 77 feet to the 20 feet underpasses. The exhibit shows all the accidents reported to the police department. A number of the accidents are some distance removed from the underpasses and result from changes in size of the roadway and also from the sharp curves." [R. 33.]

Appellant's summary of the record of the hearing before the Public Utilities Commission contained in Appendix "B" to its petition for writ of review was implemented by respondent City in its answer and brief [R. 147-194] by calling attention to the following evidence before the Commission:

The City of Los Angeles has a right of way or easement for street purposes at the site of the grade separations which is 90 feet in width and was acquired by negotiation and condemnation. [R. 152.] At present there are no facilities for pedestrian traffic and, further, if no proper allocation of costs of widening the existing underpasses is made, the City can build crossings at grade and trains would have to obey traffic signals. [R. 152.]

While the cost of widening the roadway by elimination of the existing underpasses and establishing a grade crossing would be $245,000, it would mean delay to both vehicular and rail traffic and be an added accident hazard. [R. 152.] The plan to widen the underpasses had its inception with the City, however the Santa Fe suggested that if this were done it should be by the use of bridges, such as provided for by the Commission's decision. [R. 153.]

In 1910 the City had a population of 102,000, and the County a population of 504,000, in 1920 the City population was 576,000 and in 1948 the City population was 1,987,000, the County being over 4,000,000. [R. 153.]

"In 1948, within a five-mile radius of the crossings here involved, there were more than 1,150,000 people, and within a ten-mile radius there were more than 2,500,000 people." [R. 153.]

"Unlike a freeway, which only serves to carry traffic, a street such as Washington Boulevard has a tremendous function in serving the properties fronting on the boulevard; freeways are entirely supplemental to the city street system and do not reduce the need of the existing street system which handles local traffic.

"A very small percentage of traffic on Washington Boulevard is through traffic that enters one end of Washington Boulevard and goes out the other end of Washington Boulevard." [R. 153.]

Mr. Jenkins, the Company witness, admitted that "there is no escaping the fact that railroad crossings constitute a hazard to life and property at the present time," and he also testified that "under present traffic conditions street

traffic presents a hazard to trains, which was 'extremely serious,' and that the elimination of such hazard was an advantage to the train." Mr. Jenkins further testified that in computing benefits to the railroad resulting from grade separations, the delay factor should be given considerable weight and that a main line railroad could not operate under signalized or synchronized control of traffic, such as that under which vehicular traffic operates. [R. 153-154.]

Mr. Jenkins also testified that "there were heavy industries in the area here involved, and that there was local traffic from such industries using Washington Boulevard. Likewise he admitted that probably 100 percent of all passenger traffic handled by railroads use city streets at some stage of their journey, so that city streets are feeders and used as feeders for the railroad business, and that a comparable situation largely exists with respect to freight, except that there is a larger percentage of freight served directly by spurs which do not involve truck connection." [R. 154.]

He likewise admitted that "the mere presence of a truck doesn't prove competition with a railroad, but instead the truck might be feeding the railroad, rather than competing with it." [R. 154.] He further admitted that "a crossing at grade would be a detriment to the Railroad." [R. 154.]

Mr. Grey, another companay witness, testified that "since 1900 there has been a very substantial increase in the business done by the Santa Fe, freightwise, over the lines using the tracks here involved; that where there is a series of tracks such as here involved; and assuming an automobile and train collision, there would be considerable

expense and delay and disruption of scheduling, which would not be reflected in claim payments; that in some accidents considerable damage is done to the Santa Fe equipment, such as when a truck collided with the Super Chief, damaging Santa Fe equipment about $150,000 and delaying the train about two hours; that a serious delay influences movement of traffic in either direction, not only at the point of the accident but further on down the line; that the tonnage now handled over these tracks is up, even greater than in 1928 or 1929 when volume was very heavy; that the San Diego line, which uses these tracks, is a very good passenger earner; that the diesel locomotives now being used handle longer trains with more tonnage, which is a benefit to the Railroad, and the longer the train the better for the Railroad, regardless of the fact that such longer trains would block grade crossings for a longer period of time." [R. 155.]

Mr. Winter (a City witness) "presented Exhibit 62 R. H., which is a land use map showing the general use of property fronting on Washington Boulevard in the vicinity of these underpasses. This shows the extensive use of Washington Boulevard for local traffic, including some 450 vehicles entering or leaving the Santa Fe yards in a 24-hour period." [R. 156.]

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1953

Nos. 22, 43

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a corporation, *Appellant*,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and CITY OF LOS ANGELES, a municipal corporation, *Appellees*. — No. 22

SOUTHERN PACIFIC COMPANY, a corporation, *Appellant*,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and R. E. MITTELSTAEDT, JUSTUS F. CRAEMER, HAROLD P. HULS, KENNETH POTTER and PETER E. MITCHELL, as members of and constituting said Commission, *Appellees*. — No. 43

Appeals from the Supreme Court of California.

BRIEF OF PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, APPELLEE.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1953

Nos. 22 and 43

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a corporation, *Appellant*, vs. PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and CITY OF LOS ANGELES, a municipal corporation, *Appellees.*	No. 22
SOUTHERN PACIFIC COMPANY, a corporation, *Appellant*, vs. PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and R. E. MITTELSTAEDT, JUSTUS F. CRAEMER, HAROLD P. HULS, KENNETH POTTER and PETER E. MITCHELL, as members of and constituting said Commission, *Appellees.*	No. 43

Appeals from the Supreme Court of California.

BRIEF OF PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, APPELLEE.

FOREWORD.

Prior to the instant joint brief by appellants, all proceedings in Cases Nos. 22 and 43 have been completely separated owing to physical, economic and other recorded differences which we believe rendered their separation proper.

The foregoing is fully confirmed by appellants' opening foreword on joint brief herein which departure is in direct conflict with their previous argument on brief before the Supreme Court of California contrasting the important differences characterizing the two instant cases (43 R. 248). Appellants, however, with the purported authorization of the Clerk of this Court (Jt. B. p. 2) have filed joint brief assertedly to avoid duplication but obviously for a screening of the numerous deficiencies and inadequacies of appellants' showing and to facilitate the indiscriminate interchange of records in an attempt to gloss over the unfavorable parts of the proceedings in an effort to convince this Court that error has been committed against them. Similarly, is their lack of compunction in utterly abandoning the instant records in favor of outside data and materials nowhere in evidence in the official records. We are philosophical as to such practices but we are duty bound to point out that not only the petitions for review in the Court below against which we registered timely protest as typical (43 R. 158-160) but that the appellants' joint brief herein is an aggravated example of the practices referred to. Confronted with the dearth of railroad evidence in the instant proceedings, appellants have gone off the record and far afield with a belated flood of global research consisting largely of the history of antiquated

versus modern transport, which, we submit, lacks pertinency herein. Nevertheless, for brevity and cooperation and owing to the Court's recent orders advancing both cases on the Summary Docket with consequent shortened period, we have endeavored to conform to, but without approving, such consolidation, and if appellants' briefing tactics whereby through artifice they impute a "plural" for "singular", and vice versa to either record prove misleading as to what the individual records and decisions actually hold, should tincture our efforts at preserving proper separation of the cases, it at least will not be intentional generalizations for the lending of complexity and confusion of the record.

For these reasons, we ask that this Honorable Court read very critically Decisions Nos. 47344 and 47420 (22 R. 115-132 and 43 R. Appx. Ex. C, 19-36) alongside the contentions of appellants and note the one-sided picture appellants *jointly* attempt to paint. Page two of appellants' joint brief, for example, misstates the capacity of Los Angeles as parties in real interest rather than appellee.

OPINIONS BELOW.

The decisions of the California Public Utilities Commission in Cases No. 22 and No. 43 (No. 22 R. 115 and No. 43 App., Ex. C 19) are reported in 51 Cal. P.U.C. 771 to 783 and 788 to 798, respectively. The orders of the California Supreme Court denying petition for writs of review are reported in 40 Adv. Cal. 54-55, and 40 Adv. Cal. 472-473, respectively. Said orders are not accompanied by an opinion.

JURISDICTION.

The California Supreme Court denied writs of review respecting the decisions of the California Public Utilities Commission in Cases No. 22 and No. 43 on December 11, 1952 (No. 22 R. 253), and on March 9, 1953 (No. 43 R. 287), respectively. Petitions for appeal were docketed as of March 20, 1953 and April 23, 1953, respectively.

Statements opposing jurisdiction with motions to dismiss or affirm were filed by the Commission in each case. Similarly, statements and motions were filed by the City of Los Angeles as appellee in No. 22 and by the Cities of Los Angeles and Glendale as "real parties in interest" in No. 43.

By order entered on May 18, 1953, this Court postponed consideration of the question of the jurisdiction of the Court in the cases pending hearing on merits and transferred both cases to the Summary Docket.

Jurisdiction of this Court rests upon 28 U.S.C. 1257(2).

QUESTIONS PRESENTED.

The ultimate question in either case is whether the action of the Public Utilities Commission of the State of California in apportioning the following railroad-highway grade separation costs among the parties is within the bounds of the Federal Constitution.

Appellants attack only that portion of the ensuing orders allocating costs amongst the parties.

Appellee Commission's Decisions Nos. 47344 (No. 22) and 47420 (No. 43) were made the subject of petitions for

writs of review before the California Supreme Court. That Court's action denying review constituted a determination upon the merits and satisfies all requirements of due process under the Federal Constitution.

California Public Utilities Code, Sections 1756-1760 (Cal. Stats. 1951, Ch. 764; formerly Public Utilities Act, Section 67);

Napa Val. Elec. Co. v. Railroad Commission, 251 U.S. 366, 371-373 (1920);

Southern Cal. Edison Co. v. Railroad Commission, 6 Cal. (2d) 737, 747 (1936);

Santa Monica v. Railroad Commission, 179 Cal. 467.

PARTIES AND POSITIONS.

Appellee Commission is a constitutional body with jurisdiction herein as hereinafter shown.

Appellants, by joint brief (p. 4) while purporting to be *interstate* railroads say nothing of the fact of their constituting the two largest *intrastate* carriers of freight, passengers and express throughout the State of California, and too, of the further fact that they are among the largest if not the two largest intrastate motor truck, motor bus, and express operators throughout said State owing to their wholly owned subsidiaries—Pacific Motor Transportation Co.-Pacific Motor Transport (Southern Pacific), and Santa Fe Transportation Company (truck and bus) along with their affiliated Highway and other common carriers.

The City of Los Angeles within which the Santa Fe's Washington Boulevard crossing is situated was a respond-

ent in the Court below, and an appellee in the appeal to this Honorable Court in No. 22. Appellants' joint brief at page 2 has erroneously stated the parties.

The Cities of Glendale and Los Angeles, California, alongside and on whose boundary lines the instant Los Feliz Road (Boulevard) grade crossing is situated, are parties of real interest herein in No. 43.

In No. 22, the Washington Boulevard improvement order, following rehearing, briefing and argument (en banc) provided amongst others:

> "Fifty percent (50%) of the costs of the proposed structure attributable to the presence of the railroad's tracks as defined in the foregoing opinion, excluding the cost attributable to the paving and widening of the street, shall be borne by The Atchison, Topeka and Santa Fe Railway Company, and the remainder of the cost shall be borne by the City of Los Angeles." [50% of $569,355] (51 Cal. P.U.C. 771, 783).

In No. 43, the Los Feliz crossing separation order, in accordance with the third alternative and cheapest plan of mutual agreement and joint introduction by the parties and of final adoption by the Commission in the course of the evidence adduced through formal proceedings, provided, amongst others, that:

> "Of the total cost of the proposed structure, as set out in the foregoing opinion, which is estimated to be $1,493,200, fifty percent (50%) shall be borne by the Southern Pacific Company, twenty-five percent (25%) by the County of Los Angeles, twelve and one-half percent (12½%) by the City of Glendale,

and twelve and one-half percent (12½%) by the City of Los Angeles." (51 Cal. P.U.C. 788, 797).

STATUTES INVOLVED.

Statutes

(California)

Public Utilities Act (Statutes 1915, Chapter 91, as amended) [Note: Now Public Utilities Code, California Statutes 1951, Chapter 764, as amended] (hereinafter quoted, in part).

Constitution

(California)

Article XII, Sections 17, 19 to 23a, inclusive.*

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*The Jurisdiction and the Authority of the Public Utilities Commission.

By Article XII, Sections 17, 19, 20, 21, 22, 23 and 23a of the Constitution of the State of California, the Public Utilities Act (Stats. 1915, Chap. 91; now Public Utilities Code, Stats. 1951, Chap. 764) the Public Utilities Commission is given plenary and exclusive authority over public utilities in this State.

Section 22 of Article XII provides in part as follows:

"No provision of this Constitution shall be so construed as a limitation upon the authority of the Legislature to confer upon the Public Utilities Commission additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred upon the Public Utilities Commission in this Constitution, and the authority of the Legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this Constitution."

Section 23 of Article XII provides in part as follows:

"• • • The railroad commission [Note: Now Public Utilities Commission] shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the state of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be

Federal

Fourteenth Amendment, and Commerce Clause, Article I, Section 8, Par. 3, Constitution of the United States;

National Transportation Policy (The Congress), 54 Stat. 899;

Other

House Resolution No. 24, California Legislature (1949);

Assembly Concurrent Resolution No. 88, California Legislature (1951).

STATEMENT.

The authority of this Commission to make grade crossing separations and apportion or allocate the costs there-

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conferred upon it by the legislature, and the right of the legislature to confer powers upon the railroad commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution."

This equivalent provision is contained in Section 23a of said Article XII.

The Legislature may confer on the Commission any and all authority it possesses over public utilities and in addition it may confer powers upon the Commission that the Legislature itself could not exercise because of constitutional restriction imposed directly upon the Legislature. The only restraint imposed upon the Legislature in conferring powers upon the Commission pursuant to said Article XII is that afforded by the Federal Constitution.

The foregoing constitutional provisions and the Public Utilities Act and Code have received interpretation at the hands of the California Supreme Court, and the plenary authority conferred thereby has been broadly upheld. *Pacific Tel. & Tel. Co. v. Eshleman*, 166 Cal. 640, 650, 689; *Clemmons v. Railroad Commission*, 173 Cal. 254, 258; *City of San Jose v. Railroad Commission*, 175 Cal. 284, 290; *Miller v. Railroad Commission*, 9 Cal. (2d) 190, 195, 198; *Sale v. Railroad Commission*, 15 Cal. (2d) 612, 617.

for as herein involved stems primarily from Section 1202 of the Public Utilities Code (California Statutes 1951, Chapter 764, as amended), from which we quote:

"1202. The commission has the exclusive power:

"(a) To determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use, and protection of each crossing of one railroad by another railroad or street railroad, and of a street railroad by a railroad, and of each crossing of a public or publicly used road or highway by a railroad or street railroad, and of a street by a railroad or vice versa, subject to the provisions of Sections 1121 to 1127, inclusive, of the Streets and Highways Code so far as applicable.

"(b) To alter, relocate, or abolish by physical closing any such crossing heretofore or hereafter established.

"(c) To require, where in its judgment it would be practicable, a separation of grades at any such crossing heretofore or hereafter established and to prescribe the terms upon which such separation shall be made and the proportions in which the expense of the construction, alteration, relocation, or abolition of such crossings or the separation of such grades shall be divided between the railroad or street railroad corporations affected or between such corporations and the State, county, city, or other political subdivision affected."

It was the position of the cities that the railroads should pay that portion of the cost attributable to the presence of their railroad tracks which, according to the record, would have amounted to about 86% of the total cost in No. 43 (S.P. agreeing to but $5,917).

It was the position of appellant Santa Fe that the costs should be allocated according to "benefits" received by the railroad, and since it disclaimed any benefits, appellant Santa Fe would contribute nothing.

Following rehearing, briefing and oral argument (en banc) the Commission in adherence to the entire records and in the light of particular facts presented during rehearing, did not subscribe to either of the foregoing contentions of said parties, but stated that in apportioning the costs due consideration should be given to the obligations of each party as well as the benefits derived, adding that the authority of this Commission to allocate costs in such matters stem primarily from Section 1202 of the Public Utilities Code (California Statutes 1951, Ch. 764, as amended) from which decisions* we quote in part:

> "The authority of this Commission to allocate costs, as designated in Section 1202 of the Public Utilities Code, supra, is an exercise of the police power on the part of the State of California through the medium of its agency, the Public Utilities Commission. We hold that the law is well established that under the exercise of the police power a state may regulate the crossings of railroads with its highways, and may require grade separations to be erected and maintained apportioning the costs in the exercise of its sound discretion. (*Erie Railroad Company v. Board of Public Utility Commissioners*, 1920, 254 U.S. 394; *Chicago, Milwaukee and Saint Paul Railway Company v. Minneapolis*, 1914, 232 U.S. 430; *Missouri Pacific Railway Company v. Omaha*, 1914, 235 U.S. 121; *Lehigh Valley Railroad Company v. Board of Public Utility Com-*

*Specifically set out in Decision No. 47344 and affirmed in Decision No. 47420 elsewhere cited herein.

missioners, 1928, 278 U.S. 24.)" (See *Cincinnati, I. & W. R. Co. v. Connersville* (1910), 218 U.S. 336; *State ex rel. Alton R. Co. v. Public Service Commission*, Mo. (1934), 70 S.W. (2d) 57, 60; *Northern Pacific R. Co. v. Minnesota ex rel. Duluth* (1907), 208 U.S. 583; *Penn.-Reading S. Lines v. Bd. of P.U.C. Comm. etc.* (1951), 81 A. (2d) 28; Affirmed, 82 A. (2d) 774.)

Also *State of Missouri ex rel. Wabash R. Co. v. Public Service Commission* (Mo. 1936), 100 S.W. (2d) 522; *Lehigh and N. R. Co. v. Public Service Commission* (1937), 191 Atl. 380, 382; *Chgo. Jct. R. Co. et al. v. Illinois Commerce Commission*, 42 Ill. 579; *State ex rel. Alton R. Co. v. Public Service Commission*, 334 Mo. 985, 70 S.W. (2d) 52, *Same*, 334 Mo. 95, 70 S.W. (2d) 57.

In so doing the Commission in its instant Decisions Nos. 47420 and 47597, which appellant, Southern Pacific, here assails, wholly affirmed its previous holdings in Decisions Nos. 47344 and 43374 (Santa Fe) hereof wherein it had clearly set forth the law when it stated:

"There is no statutory requirement that this Commission follow any particular theory of allocation of costs. Under the theory advanced by the City of Los Angeles that the railroad should pay the additional costs of construction resulting from the presence of the tracks, the railroad's share would amount to about 86 per cent of the total costs. Under the theory advanced by the railroad that it should pay only according to the benefits it receives, and considering its contention that it receives no benefits, its contribution would be nothing.

"The authority of this Commission to allocate costs, as designated in Section 1202 of the Public Utilities

Code, *supra*, is an exercise of the police power on the part of the State of California through the medium of its agency, the Public Utilities Commission. We hold that the law is well established that under the exercise of the police power a state may regulate the crossings of railroads with its highways, and may require grade separations to be erected and maintained, apportioning the costs in the exercise of its sound discretion."

"While the railroad [Southern Pacific] contended that costs should be assessed according to the so-called 'benefits' theory, we affirmed our holding in Decision No. 47344, dated June 24, 1952, in Application No. 29396, wherein it was held that the authority of this Commission to allocate costs stems primarily from Section 1202 of the Public Utilities Code and is an exercise of the police power on the part of the State of California through the medium of its agency, the Public Utilities Commission. Therefore, we are not bound to follow this so-called 'benefits' theory, although it is appropriate to observe that the proposed grade separation will obviously be of benefit to the railroad. * * *" (P.U.C. Decision No. 47420, pages 795-796).

Appellants have asserted that the Commission has adopted the so-called "benefits" theory as a policy for the apportionment of costs, including selected citations therefor, but a careful reading of those cited by them do not support such contention. For instance the *Goshen Junction case*, 38 C.R.C. 380 (1933) involved a *state* highway to be paid in part with *Federal-aid funds* for highway construction, in the course of which the Commission took cognizance of the then existing depression and expressly gave

consideration to "the economic situation, particularly at this time when revenues from practically all sources are materially below what they have been in the immediate past". Said facts are borne out by this Commission's Decision No. 25069 of August 15, *(1932)*, for example, as reported in 37 C.R.C. 784, 786-787, and in which it specifically repudiated the so-called "benefits theory" of apportioning grade separation costs in these words:

> "The matter of direct financial benefits is not the sole test in the determination of the respective portions which the railroad and public should contribute toward the cost of such improvement. In apportioning the cost of constructing these separations between applicant and the railroad company, due consideration should be given to the obligations of each party, as well as to the benefits derived. *It should be recognized that the railroad has a continual obligation to participate in the matter of constructing and maintaining reasonable and adequate crossings over its tracks, both at grade and at separated grades. This obligation is inherent, notwithstanding the fact that the traffic on the railroad may increase or decrease.*" (Emphasis added.)

Other citations of the kind by petitioners appear so widely different, factually speaking, as to neither require nor admit of detailed analysis herein. In this connection, we respectfully submit that the Public Utilities Commission of California may, with perfect legal propriety, take inconsistent action in different cases. The test—and the only test—is: On the record in these cases has the Commission remained within the bounds of the Federal Constitution?

Suffice it to state that the Supreme Court of the United States in the case of *Georgia Public Service Commission v. United States*, 283 U.S. 765, 775, laid down the following rule:

> "* * * It is not our province to inquire into the soundness of the Commission's reasoning, the wisdom of its decisions, or the consistency of its conclusions with those reached in similar cases."

This same rule is supported by the following authorities:

Wilbur v. United States, 281 U.S. 206, 216-217;
Securities and Exchange Commission v. Chenery Corporation, 218 U.S. 80;
Federal Administrative Law by vom Baur, pp. 244 to 246, section 256.

Appellants in limiting their attacks against the instant orders to only that portion allocating costs, thereby automatically waive all other portions of said orders.

It follows, therefore, that in seeking support for that portion actually under attack they are not entitled to draw upon other portions of such facts, findings, conclusions, opinions and orders as not specifically embraced in the limited portions actually attacked herein.

In their dilemma as to alternatives of action, and the consequent quandary as to true status they have made *blanket* charges against several entire decisions *in toto* as being in deprivation of (1) property without due process, (2) equal protection under the law, and (3) unduly burdensome on interstate commerce, when in reality only allocation of costs (often by supplemental order) is in-

volved. Lacking in actionable grounds, of course, finds them likewise lacking in other respects—cases.

In thus contending, appellants rely upon the single unique and completely distinguishable case of *Nashville C. and St. L. R. Co. v. Walters*, 294 U.S. 405, hereinafter referred to as the *Nashville* case, respecting which we submitted a detailed analysis and our conclusions as to its being wholly inapplicable to the instant cases at bar (Ex. No. 2, 43 R. 134, 139 and 22 R. 85-94).

As already indicated, it is of record that this Commission in apportioning the instant costs of construction gave due consideration to the obligations of each party as well as the benefits derived (51 Cal. P.U.C. 771, 778) (22 R. 115, 129).

We have uniformly contended that the *Nashville* case is no authority for the inference by appellants that the law has now been changed so that railroads cannot be required to pay the costs of grade separations.

As was stated by this Honorable Court in the *Nashville* case (p. 431) (22 R. 88):

> "* * * No case involving like conditions has been found in any of the lower Federal courts; nor, excepting the case here under review, has any such been found among the decisions of the highest courts of any State."

This, we think, makes it abundantly clear that the Supreme Court of the United States did not intend that the *Nashville* case should be considered as reversing the long line of prior decisions setting forth the railroads' re-

sponsibility in connection with grade separations. From a detailed analysis of the *Nashville* case (22 R. 85 and 43 R. 134) we have shown it to be wholly inapplicable to the instant cases at bar, hence shall not repeat the record at this time.

STATEMENT*—SUMMARY—ARGUMENT.

1. "R.R." Benefits.

In thus collectively summarizing it is respectfully submitted that appellants are highly inconsistent in their clamor for net "benefits" to rail operations, meaning a net profit to rail operations, and simultaneously disclaiming numerous other important and substantial benefits and advantages to both themselves and their wholly owned highway subsidiaries.

Appellants seem to forget that they received tremendous benefits when the State of California permitted them to exercise the high privilege of operating within its borders. It must be kept ever in mind that a public utility *performs a function of the State (Smyth v. Ames,* 169 U.S. 466, 544) and *exercises an extraordinary privilege* and *occupies a privileged position (United Fuel Gas Co. v. Railroad Commission,* 278 U.S. 300, 309). Each day that appellants exercise this extraordinary privilege granted to them by governmental authority they receive extraordinary benefits

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*In lieu of detailed abstracts of the transcript of the records please refer to the following:

1. Washington Boulevard, Decision No. 47344 (51 Cal. P.U.C. 771-783) (No. 22 R. 115-132) and
2. Los Feliz, Boulevard, Decision No. 47420 (51 Cal. P.U.C. 788-798) (No. 43 R. Appendix, Exhibit C, pages 19 to 36).

by requiring appellants to pay the entire cost (if the State sees fit to require it) incident to the establishment of a grade crossing or grade separation is only one of the just burdens incumbent upon appellants to bear in consideration of the extraordinary privilege which appellants have received from governmental authority and which they daily enjoy. Therefore, when appellants clamor for benefits, the ready answer and reply is: "You have already received your benefits." And above and beyond this, *we must not forget that costs which a railroad bears in connection with grade crossings and grade separations are passed on to the rate payers of the railroad in the form of rates.*

That leading cases prior to, during and since the so-called *Nashville* case support the controlling principles of law whereby a railroad company takes its charter subject to the power of the State to provide for the safety of the public, and tracks of the railroad are laid subject to the condition necessarily implied that their use can be so regulated by competent authority as to insure said public safety, welfare, convenience and necessity needs no comment herein. Also, that such railroad, when thus accepting privileges and franchise granted in its charter must be deemed to have taken into account expenses which might thereafter be incurred by reason of an order of the Public Utilities Commission compelling the necessary installation for its safe operation at public highways likewise needs no further confirmation. (*Penna.-Reading Seashore Lines v. Board of Public Utility Commissioners, Department of Public Utilities, et al.* (1951), 81 A. (2d) 28, 33; affirmed in 82 A. (2d) 744.

2. Interstate Commerce.

The decisions of the Commission do not constitute an unlawful or other burden on interstate commerce. The fact that appellants constitute the two largest rail-truck-bus-express operators throughout California and also engage in interstate operations does not alter the situation.

Appellants' claims that the instant orders unduly burden interstate commerce are equally remote and unfounded when it is considered that throughout the entire proceedings herein no showing has been made herein that the Commission orders will in anywise result in impairment of appellants' ability to render the services required under the law or that the Commission's orders in anywise impinge on the national transportation policy.

Furthermore, it is assumed that the Honorable Court will take judicial notice of appellants' greatly enhanced financial status wherein their net earnings have attained maximum peaks during and since the instant proceedings. The mere fact that appellants are engaged in interstate as well as intrastate commerce has no significance so far as the validity of the instant orders are concerned. Appellants do not categorically assert that a state has no authority to burden or regulate interstate commerce, but it might be inferred that such contentions are being made by appellants from the propositions advanced by them.

We desire to direct attention to the rule laid down by this Honorable Court that a State may lawfully burden interstate commerce and regulate it so long as state authority does not discriminate against such commerce. *(So. Carolina State H. Dept. v. Barnwell Bros.*, 303 U.S. 177,

189; *Panhandle Eastern Pipeline Co. v. Michigan Public Service Commission*, 341 U.S. 329, 333; *Railway Express Agency v. New York*, 336 U.S. 106, 111; *Kelly v. Washington*, 302 U.S. 1, 9-15; *Cities Service Gas Co. v. Peerless O. & G. Co.*, 340 U.S. 179, 186), and it has long been held by the United States Supreme Court that until such time as the Congress preempts the entire field of regulation, both interstate and intrastate common carriers and utilities are subject to State regulation in so far as intrastate operations and services are concerned even though their operations are regulated by federal authority (*Cooley v. Board of Port Wardens* (1851) 12 Howard (U.S.) 299; *Minnesota Rate Cases* (1914) 230 U.S. 352; *Eicholz v. Public Service Commission* (1939) 306 U.S. 268; *Smith v. Illinois Bell Telephone Co.* (1930) 282 U.S. 133; *Lindheimer v. Illinois Bell Telephone Co.* (1934) 292 U.S. 151). No confiscation has been shown and none can be shown by either of the appellants, the enhanced financial conditions of which exceed all others of Western Territory.

3. Pedestrian Traffic Hazards and Passenger-Carrying Vehicular Traffic.

One of the highly important topics for priority consideration in these cases, and the one that has been most studiously avoided by each of the appellants is the matter of the safety, welfare and convenience of the comparatively large number of pedestrians using the Los Feliz and Washington Boulevard crossings. In the former the record supports through official Exhibit No. 2 (R. 43) the fact that on an average over 600 pedestrians use the Los Feliz intersection daily, most of whom cross the several main line and other tracks of said appellants.

In both proceedings, the Commission, in specifically finding for the "public safety, convenience and necessity" responsive to public demands for relief and pursuant to California Legislature Resolutions directing it to proceed, continually recognized the pedestrian and passenger-carrying vehicular aspects of the instant situations emphasizing the local transportation needs and the Cities' contribution thereto must come entirely from local funds, since neither is a State Highway nor Federal-aid project (51 Cal. P.U.C. 780-782, 788-798). Likewise, it is shown that in the 20′ underpasses embraced within the Washington Boulevard improvement that no provision whatsoever exists for the hundreds of pedestrians daily using that crossing. The point is therefore how, in view of the facts as established by day by day actual counts of the pedestrian traffic at these two crossings, can the respective appellants decry the subject of safety, convenience and necessity against and harp entirely upon the matter of trucks, which latter vehicles, according to the record, include many local and light delivery trucks and constitute less than 25% of the total vehicles using said crossings. It is common knowledge that private passenger cars using these crossings carry one or more passengers in addition to the drivers of such vehicles, and it is similarly established that even the motor trucks carry as a minimum one driver or more personnel. As regards the safety, welfare and convenience of all of these, the appellants are silent, urging instead that the only dangers obtaining at these crossings are those of competitive trucks operating in opposition to said appellants' railroads. (Apparently little mention and no criticism of the numerous railroad owned trucks and buses involved.)

LIBRARY
SUPREME COURT. U.S.

San Francisco, California
October 8, 1953

TO ALL PARTIES OF RECORD:

Re: Cases Nos. 22 and 43 in the Supreme Court of the United States, October Term 1953

E R R A T A

Please refer to Appellee Commission's joint brief in the above cases, and correct the following typographical errors and omission, to-wit:

Page 5 (ninth line from bottom)

"is" should read "if"

Page 21 (following third to last line) add:

"order of the Public Service Commission authorizing the widening of a concrete viaduct over a railroad, said: 'The state has the right to build its other public highways, for travel by other means, over, across, or under the railroad. To accommodate such travel, it has the right to build new roads across railroads at new places and provide for the necessary kind of crossing, or to widen existing roads and alter such crossings already established, as the public interest may in either case reasonably require. If it did not, it would no longer be the sovereign.' and,"

Page 24 (tenth line from top)

"can" should read "cannot"

PUBLIC UTILITIES COMMISSION
OF CALIFORNIA, Appellee.

(Please insert at page 21 of brief.)



4. Police Power.

It is respectfully submitted that appellee Commission regularly pursued its authority in the instant proceedings.

Certainly, appellants cannot validly contend that they have not been accorded procedural process to the utmost and given every opportunity to present their cases. These are sufficient under the laws and the Constitutions.

As state by Mr. Chief Justice Taft in *Lehigh Valley Railroad Co. v. Board of Public Utility Commissioners*, 278 U.S. 34, 35:

> *"The care of grade crossings is peculiarly within the police power of the states."* (Citing cases.) (Emphasis added.)

Also, so zealously have the Courts guarded the police power of the States and their political subdivisions with respect to railway crossings of highways, they have held in numerous cases where municipalities have by contract agreed with railway companies to pay the expenses of maintenance and repair of grade separation structures after their construction, that such contracts are void as against public policy, since they constitute the virtual abdication of sovereign powers, it being said in such cases that the "police power cannot be contracted away" (*Northern Pacific Railroad Co. v. Minnesota ex rel. Duluth*, 208 U.S. 583, 596; *Chicago, M. & St. P. R. Co. v. Minneapolis*, 232 U.S. 430, 441). Also, as stated in *State ex rel. Alton R. Co. v. Public Service Commission* (Mo. 1934), 70 S.W. (2d) 57, 60, the Supreme Court of Missouri in upholding an that as stated by Mr. Justice Holmes in the *Erie* case heretofore cited:

> "That the states might be so foolish as to kill a goose that lays golden eggs for them has no bearing on their constitutional rights." (254 U.S. 410),

and that as to the inherent continuing obligation aspects herein the Supreme Court has said:

> "There can be no question as to the attitude of this court upon this question, as it has been uniformly held that the right to exercise the police power is a continuing one, that it cannot be contracted away, and that a requirement that a company or individual comply with police regulations without compensation is the legitimate exercise of the power, and not in violation of the constitutional inhibition against impairment of the obligation of contracts."

5. Confiscation.

That in reply to appellants' allegation of taking property without payment, in affirming judgment in *Chgo. M. & St. P. R. Co. v. Mpls.*, 232 U.S. 430, 437, where this question was presented, the Court concluded:

> "It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings, but also to build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their tracks, or to carry their tracks over such highways.",

and as was similarly held in *Missouri Pacific R. Co. v. Omaha*, 235 U.S. 121, 127, that in discussing the rule respecting decisions pursuant to the police power and supporting facts therefor, this Supreme Court has held that if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence

of that state of facts, and one who assails classification must carry the burden of proof that the action is arbitrary. *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 185-186, citing *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194, 209.

6. P.U.C. Procedures.

In the *Nashville* case on which appellants rest their combined efforts of attack for the nullification of the police power of the State, in order to advance their own rail "benefits" pleas, this Honorable Court at page 433 said:

> "* * * When the scope of the police power is in question the special knowledge of local conditions possessed by the State tribunals may be of great weight. (Citing cases) * * *"

and expressly recognized the following principle of law (quoting the Court):

> "It is also true that state action imposing upon a railroad the cost of eliminating a dangerous grade crossing of an existing street may be valid although it appears that the improvement benefits commercial highway users who made no contribution toward its cost." (Citing cases.) (294 U.S. 405, 430.)

The Supreme Court of the United States has held in an unbroken line of decisions that Courts must not substitute their judgment for that of regulatory bodies (*St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38; *Railroad Commission of Texas, et al. v. Rowan and Nichols Oil Co.*, 310 U.S. 573, 581-582), pointing out that a Court must not substitute its judgment for that of the regulatory body even though the evidence is convincing that the judgment

of the Court is better than the result arrived at by the regulatory body (*Railroad Commission of Texas v. Rowan and Nichols Oil Co.*, 311 U.S. 570; *National Labor Relations Board v. Link-Belt Co.*, 311 U.S. 584, 596, 597. This rule is not altered or varied even though the facts are not in dispute. Such a state of record makes no difference (*Gray v. Powell*, 314 U.S. 402, 412).

Mr. Justice Holmes, speaking for the Court, stated the rule very succinctly as follows:

> "It is enough if we can say that it was *impossible* for a fair-minded board to come to the result which was reached." (*San Diego Land and Town Co. v. Jasper*, 189 U.S. 439, 441-442.) (Emphasis added.)

Procedurally speaking, the instant situation as urged by appellants is well characterized by this Court in the case of *American Toll Bridge Co. v. Railroad Commission*, 12 C. (2d) 184, 207:

> "• • • Nothing appears which justifies a conclusion that all the essentials of a full and fair hearing before the Railroad Commission [Public Utilities Commission] were not accorded the petitioner in compliance with requirements of the constitutional mandate."
>
> • • • • • • •
>
> "• • • We conclude that the procedure followed in the present matter has not infringed upon the rights of the petitioner vouchsafed to it by the State and Federal Constitutions."

And in *Southern California Edison Co. v. Railroad Commission*, 6 Cal. (2d) 734, 748, the Court, in denying such a review as here sought by appellants, commented as follows:

> "There is another field of extensive scope in which the respondent commission exercises its powers and wherein the action of the commission is brought into question before this Court. In this field are the executive and administrative orders of the Commission in connection with which the Commission exercises a wide discretionary power, such as in the granting, withholding and cancelling of permits and countless other orders of regulation and control. Within this classification, it quite often happens that the complaining party seeks redress in this Court on alleged federal constitutional grounds, when in fact there is no such question substantially involved. In such cases, it may not be successfully contended that this Court, on a review proceeding involving the action of the Commission, should be a trier of disputed questions of fact, already resolved by the Commission."

All told, it seems perfectly clear, therefore, that the motivating purpose is and the obvious results are Southern Pacific's, and Santa Fe's attacks herein would be the ultimate defeat through prolonged and futile negotiations of any and all State grade separation relief owing to the highly controversial character of the impracticable benefits theory (meaning a net monetary railroad operating profit or we won't pay) which they here seek to obtain, and just as we have said heretofore and as we here reiterate, that mindful of the history of Commission grade crossing procedures it is doubly apparent that appellants' rail benefits theory here urged would be a perversion of grade crossing regulation as it exists in California, and would virtually nullify the present constitutional and statutory mandates of this State.

Additionally, the instant situation as stated by the Honorable Supreme Court of the United States speaking through Mr. Chief Justice Vinson:

> "* * * It is now settled that a utility has no right to relitigate factual questions on the ground that constitutional rights are involved." *Alabama Public Service Commission v. Southern Railway Co.*, 341 U.S. 341 347 (citing cases), *New York v. United States*, 284 U.S. 284, 334-336.

Contrariwise, however, appellants lacking semblance to a case come screaming to this Court to change the law.

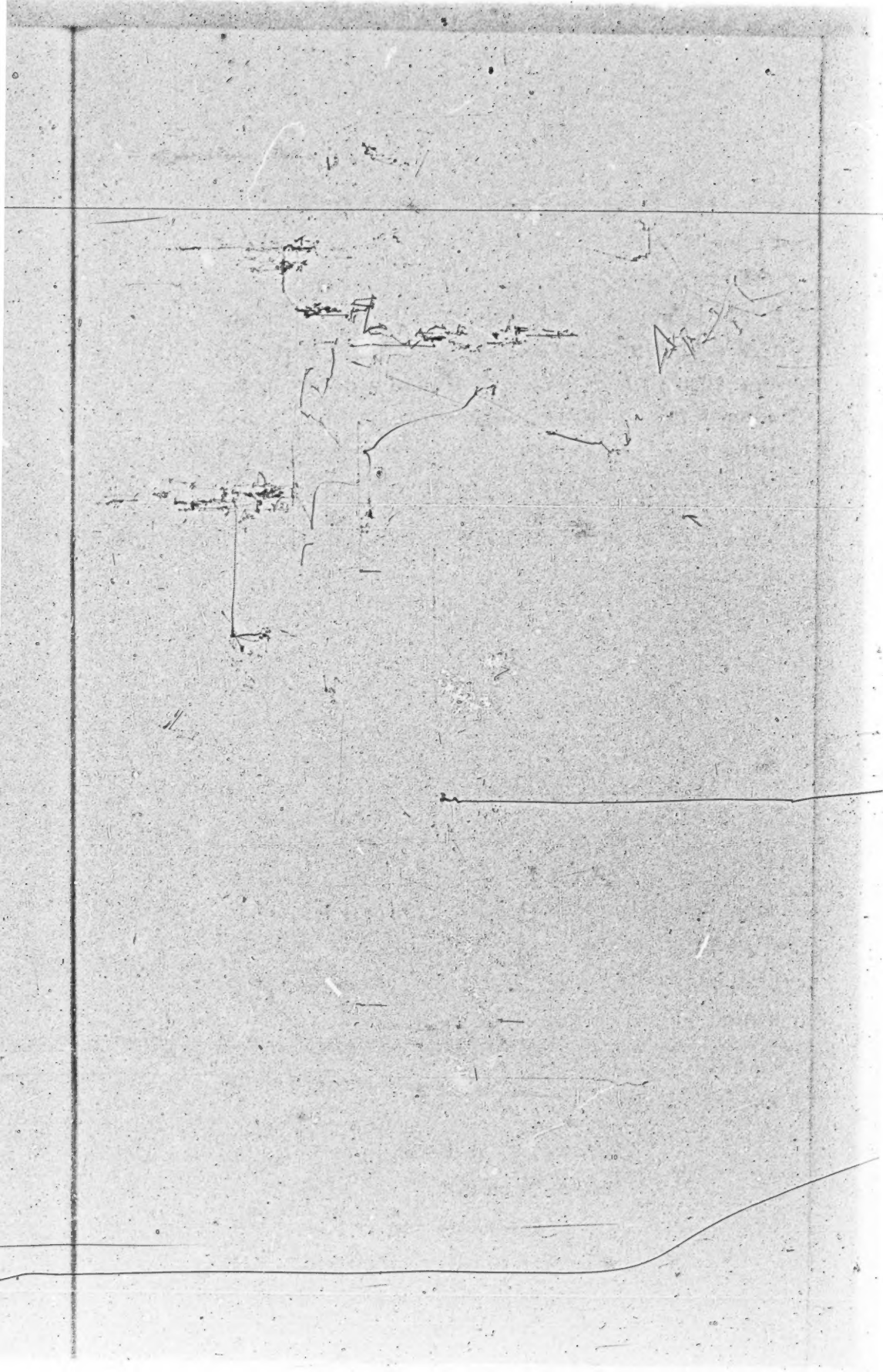
Of course, if the law is to be changed as appellants have sought and here seek, then we do not know if there is very much of anything that we can do about it.

CONCLUSION.

It is respectfully submitted that the within appeal should be dismissed and certiorari denied or that the judgments and decrees of the Supreme Court of the State of California denying petitions for writs of review and the decisions and orders of the Commission be affirmed.

Dated, San Francisco, California,
October 5, 1953.

EVERETT C. MCKEAGE,
HAL F. WIGGINS,
Attorneys for Appellee
Public Utilities Commission of the
State of California.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 739

SOUTHERN PACIFIC COMPANY, a corporation,
Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and R. E. MITTELSTAEDT, JUSTUS F. CRAEMER, HAROLD P. HULS, KENNETH POTTER and PETER E. MITCHELL, as members of and constituting said Commission,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, appellant submits herewith its statement particularly disclosing the basis upon which this Court has jurisdiction on appeal to review the judgment of the Supreme Court of California in this cause.

Opinions Below

The Supreme Court of California entered a final order in this cause, but wrote no opinion. The original opinion

and order rendered herein by the Public Utilities Commission [1] of California, identified as its Decision No. 47420, are reported at 51 Cal. P.U.C. Reports 788, and are reproduced as Appendix A to this statement. The Commission's opinion and order denying rehearing (identified as its Decision No. 47597) are not reported; a copy thereof is attached as Appendix B.

Jurisdiction

The final judgment of the Supreme Court of California in this cause was entered on March 9, 1953. A petition for appeal was presented to the Chief Justice of said Court on March 23, 1953. The jurisdiction of the Supreme Court to review this judgment by appeal is conferred by Title 28, United States Code, Section 1257(2).

The State action, the validity of which is sought to be determined by this appeal, is contained in the decisions of the Commission above referred to, which among other things direct and require appellant to bear one-half of the total cost of the construction of a grade separation to be built at the point where petitioner's main line of railroad crosses Los Feliz Road (Boulevard), a public street and highway in the Cities of Los Angeles and Glendale, California. This Court has held that; "Such an order, being legislative in nature and made by an instrumentality of the State, is a State law within the meaning of the Constitution of the United States and the laws of Congress regulating our jurisdiction."

Lake Erie & Western R. Co. v. *Public Utilities Commission*, 249 U. S. 422, 424 (1919);

Live Oak Water Users Assn. v. *Railroad Commission of California*, 269 U.S. 354, 356 (1926);

Hamilton v. *Regents*, 293 U.S. 245, 258 (1934).

[1] Hereinafter, for brevity, generally referred to as "the Commission".

The Federal Questions Presented, and the Manner in Which They Were Raised

The essential questions presented on this appeal are whether, in the light of the Due-Process and Equal-Protection Clauses of the Fourteenth Amendment to, and the Commerce Clause of, the Constitution of the United States, a State regulatory tribunal purporting to act under authority of a State law may validly order the appellant, an interstate railroad carrier, to pay and bear an amount and proportion (in the case at bar, one-half of an estimated total of $1,493,200) of the cost of construction of a railroad-highway grade separation: where (1) the amount thus ordered to be borne by appellant is admitted to be wholly unrelated to, and greatly in excess of, the value of the benefits which appellant will receive therefrom; (2) the separation is not required for reasons of safety, and in fact no safety claim is seriously asserted; (3) the only substantial reason urged, or found to exist, in justification of said construction is that it will provide for and permit the rapid and uninterrupted movement of a large and increasing volume of motor-vehicle traffic, which presently experiences delay and interference whenever a train or engine moves over the existing grade crossing; and (4) the allocation of the construction cost to the parties in interest, particularly appellant, is not responsive to or supported by any evidence, but on the contrary is in effect conceded to be a purely arbitrary assessment.

In its petition for writ of review addressed to the Supreme Court of California, the highest court of the State, and the only court thereof having jurisdiction to review orders of the Commission, appellant contended specifically, and in detail, that the Commission's orders violate the Commerce Clause, and the Due-process and Equal-protection

Clauses of the Fourteenth Amendment, in the respects and for the reasons above summarized.[2]

The same essential contentions were duly raised and presented by appellant in the proceedings before the Commission in which the decisions under challenge were rendered, and thereafter in briefs filed with that Commission, both prior to the initial decision, and in support of a petition for rehearing filed by appellant with the Commission.

The federal questions have thus been raised and urged at every opportunity, and at all stages of the proceedings leading up to the final action by the Supreme Court of California, embodied in the judgment and order from which this appeal is taken. That Court's final action consisted of an order, rendered without opinion, two justices dissenting, by which appellant's petition for writ of review was denied. A copy of the order is attached as Appendix C. That order constituted a judgment on the merits, upholding the Commission's decisions against appellant's claim of invalidity based upon the Federal Constitution.

Napa Valley Electric Co. v. *Railroad Commission of California*, 251 U.S. 366, 372-373 (1920).

Statute Involved

The statute involved, as that term has been defined by this Court, consists of Decision No. 47420 of the Public Utilities Commission of California, entered in this cause on June 30, 1952 (Appendix A), and its Decision No. 47597, denying rehearing, entered herein on August 19, 1952 (Appendix B).

These orders have repeatedly been asserted by the Commission itself to have been legislative in character, i.e., an

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[2] Appellant's contention that the Commission's orders are invalid because in conflict with the provisions of the Federal Constitution were set out in full, in Part IV of its Petition for Writ of Review (pages 7-9).

exercise of the police power, pursuant to legislative delegation. Compare Dec. No. 47420, 51 P.U.C. Reports, at p. 795: Appendix A, *infra*.

Statement

Appellant, Southern Pacific Company, is an interstate common carrier by railroad. The lines which comprise its system are located in nine of the western and southwestern states: extending from New Orleans, Louisiana, across Texas, New Mexico, and Arizona, to Los Angeles, California, and thence by two main routes along the Pacific Coast to San Francisco, and to Portland, Oregon; and including also a line extending from San Francisco, across California and Nevada, to Ogden, Utah. The total road mileage of the system is more than 12,400.

Ever since the year 1874 appellant has maintained and operated a railroad line between Los Angeles and San Francisco. At a point adjacent to the present boundary between the Cities of Los Angeles and Glendale this line, which is built on a private right-of-way acquired in 1873, crosses a street now known as Los Feliz Road (Boulevard). This street was first opened across the railroad some time after 1887. At all times the crossing over the railroad tracks has been at grade; for many years continuous (24-hour) protection against collisions between vehicles on the roadway, and trains or engines on the railroad, has been afforded by crossing gates, operated by employes of appellant.

For at least 30 years, Los Feliz has been an important major highway artery, providing a direct through route between heavily populated areas of Los Angeles County, and connecting directly with various major interstate highways, notably U. S. Highways 99 and 66. A traffic count at the Los Feliz crossing, taken in 1925, and referred to in

the Commission's Decision No. 17330 (28 Cal. R.C. Reports 516, 520), showed that on a typical day in that year 14,205 vehicles passed over the Los Feliz crossing in the 16-hour period, 6:00 A.M. to 10:00 P.M. Since 1925, the roadway has been widened and improved so that now there are six traffic lanes; and the number of vehicles using the crossing is about 27,000 per day. In contrast, however, the number and frequency of train movements over the crossing do not appear to have increased materially in recent years. Switching movements over the crossing are generally at night, and do not interfere substantially with the highway traffic. Through freight and passenger trains rarely, if ever, stop so as to block the crossing. On the average weekday, the crossing gates are lowered for train and engine movements about 70 times in the 24 hours; on Sundays, about 60 times.

The traffic counts also disclose that trucks (not including light-panel trucks) and buses use the crossing in substantial numbers, especially on weekdays. The average number of such trucks per weekday was 1105 in 1951; the average number of buses, 193.

Recognizing the importance of Los Feliz as a through highway, proceedings were instituted in 1925 before the Commission looking to the construction of a separation. The Commission, after hearing, rendered its Decision No. 17330, above referred to, approving and authorizing such construction. That decision shows that it was then estimated that the separation would cost $421,790.

The authority thus granted was never exercised because (as stated by the Commission in Decision No. 47420, 51 Cal. P.U.C. Reports, at p. 790, Appendix A, *infra*) the parties later requested dismissal of the proceedings, alleging that finances were not available for the construction.

By 1951, the volume of traffic over the Los Feliz crossing had greatly increased, i.e., had practically doubled, as shown

above. The delays to and interferences with such traffic, and with similar traffic moving through the nearby intersection of Los Feliz with San Fernando Road (U. S. Highway 99), occurring when the crossing gates at Los Feliz were lowered, had become correspondingly serious. The City of Glendale therefore applied (May 7, 1951) to the Commission for an order authorizing construction of the separation, and apportionment of the cost. The formal application asserted that the separation was required for the following purposes:

> "(a) To permit Los Feliz to carry its normal traffic without the delays caused by the passage of trains;
> (b) To prevent traffic congestion and the blocking of traffic on San Fernando Road, a State highway; and
> (c) To permit the public to receive and enjoy the full benefit of its present large investment in the traffic facilities afforded by the present improvements on Los Feliz."

It will be noted that the purposes thus specified did not include any reference to safety, or the prevention of accidents at the crossing.

Subsequently the Commission instituted its own investigation of the question whether the separation should be built. The City's application and the Commission's investigation were consolidated for purposes of hearing and decision. After receiving evidence, and considering briefs filed by certain of the parties in interest, the Commission rendered its Decision No. 47420 (Appendix A, *infra*). In that decision, the Commission reviewed the evidence in considerable detail, and noted, among other things: (1) that the testimony of a witness for the applicant was to the effect that the proposed grade separation was of utmost importance, due to the heavy population of the area, and to the daily flow of vehicles and trains at the intersection;

and (2) that a cooperative study had been made (the results of which were specially set forth), developing the monetary values of the principal benefits accruing from the separation. The Commission concluded and found that the construction was in the interest of public safety, convenience, and necessity, and would be practicable; and further, that the proposed construction did not concern a state highway.

As to the allocation of costs, appellant had contended that the Commission should be guided by the "benefit principle", as stated in this Court's opinion in a very similar case: *Nashville, C. & St. L. R. Co.* v. *Walters*, 294 U.S. 405, 430 (1935): "So-called assessments for public improvements, laid upon particular property owners, are ordinarily constitutional only if based on benefits received by them."

The Commission held, however, that it was not "bound to follow the so-called 'benefits' theory"; and referred to and affirmed its holding in its then recent Decision No. 47344 (51 Cal. P.U.C. Reports 771).[3]

In that decision, which involved the proposed reconstruction and widening of certain underpasses where the lines of the Santa Fe cross Washington Boulevard in the City of Los Angeles, the Commission had taken specific note of the railroad's reliance upon this Court's decision in the *Nashville* case. The Commission had refused to follow that decision, holding instead (51 Cal. P.U.C. Reports, at p. 781) that "under the exercise of the police power" it might apportion the costs of a grade separation "in the exercise of its sound discretion".

Having thus concluded in the present case, as in its Decision No. 47344 in the *Santa Fe* case, that in the exercise of the police power its discretion was completely unhampered

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[3] The allocation of cost made by the Commission in Decision No. 47344, having been sustained by the Supreme Court of California through denial of a petition for a writ of review, is now being challenged by an appeal to this Court, on behalf of the railroad there involved, the Atchison, Topeka and Santa Fe.

by any constitutional limitations, the Commission made no attempt at all to justify the 50-percent allocation to appellant by reference to either the evidence before it, or any ascertainable standard. While the Commission did include in its opinion a comment to the effect that the Los Felix separation would obviously be of benefit to the railroad, and in this connection referred to testimony of both its own Transportation Engineer, and an engineering witness called by appellant, there was not and never has been, at any stage of the case, any pretense or suggestion that the allocation was based thereon. This very testimony, which in fact is reproduced in part elsewhere in the opinion (51 Cal. P.U.C. Reports, at pp. 793, 794), demonstrated that the value of the benefits accruing to appellant was less than one-sixth of the actual assessment laid upon it ($118,340, as compared to $743,600). Thus it is apparent, on the face of the decision, that the allocation is entirely arbitrary, and not in any sense a reasoned and conscientious effort to exercise an informed judgment based upon benefits, or a reflection of any other definite standard or principle. The Commission has never advanced any contrary contention. Instead, it has taken the firm position that this allocation is an exercise of the police power of the State, and asserted that that reason is completely sufficient to support its refusal to be guided by the testimony showing the benefits to the railroad, or to allocate the costs of the construction on that basis.

Upon denial by the Commission of appellant's petition for rehearing (Decision No. 47597; Appendix B, *infra*), appellant filed a petition for writ of review in the Supreme Court of California, supporting that petition by a detailed memorandum of points and authorities, with an appendix in which the essential facts bearing upon the issues presented by the petition were set forth. On March 9, 1953, that Court entered its order (Appendix C, *infra*) denying the petition,

two justices dissenting; following which this appeal was duly taken to this Court.

The Questions Presented are Substantial

As already indicated, this case is a companion to "*Atchison, Topeka and Santa Fe Railway Co.* v. *Public Utilities Commission of California, et al.*", now pending in this Court. In that case the Santa Fe, as appellant, has challenged the Commission's Decision No. 47344, in which the Commission has undertaken to require the railroad to bear one-half of the cost of reconstructing the Washington Boulevard grade separations in the City of Los Angeles. The basic contentions advanced by the railroads in these two cases have been and are essentially the same. The Commission's action in the *Santa Fe* case was cited and affirmed, by the Commission, in its Decision No. 47420 in the case at bar. While the immediate fact situations in the two cases present some incidental differences, the broad background, and consequently the controlling considerations, are virtually identical.

As stated in the appellant's Jurisdictional Statement in the *Santa Fe* case, the circumstances presented in these cases are not unique or even unusual. There have been many proceedings involving railroad-highway grade separations, in which the principal, if not the sole, contested issue had to do with the apportionment of the costs, as between the railroad and the other interests involved, ordinarily the state or local public authorities proposing the separation. With the continuing substantial increase in the volume of automotive traffic, especially the larger-sized commercial vehicles handling inter-city movements, it is to be expected that more and more demands will be made for the separation of rail-highway crossings, so as to forestall

or do away with grade-crossing delays; and many more of these cases will arise.

Thus the question of the proper standards to be observed in allocating construction costs presents a constitutional issue of outstanding public importance: for no matter how urgent the demand, the actual determination whether in a given situation a separation shall be built invariably depends, in the last analysis, upon the availability of funds and thus, in turn, upon the contributions which can be exacted, under persuasion or compulsion, from the various interests involved.

These two cases are, however, unique and distinctive in at least one respect: the Commission's abrupt and largely unexplained refusal to be guided, in its asserted exercise of the police power, by the constitutional principles so clearly stated by this Court in the *Nashville* case, *supra*, and there applied to reverse a decree approving an arbitrary imposition of grade-separation costs upon the railroad, of the same degree and character as in the case at bar. This feature of the present cases is the more marked because the Commission, more than 20 years ago (Decision No. 25551, *Goshen Junction Separation*, 38 Cal. R.C. Reports 380, January 16, 1933) formally adopted the benefit principle, in effect anticipating by two years this Court's pronouncement in the *Nashville* case. The Commission thereafter steadfastly followed and applied that principle for more than 18 years (i.e., until its first decision in the *Santa Fe* case). During that period this appellant and its system lines in California were parties to more than 100 grade separations within the State. In each of these cases the costs were apportioned, generally by agreement, but uniformly on the basis of benefits; and in each such case the apportionment, as well as the other features of

the construction, were approved by formal order of the Commission.

1. *The Historical Background:*

When the railroads were first built in the United States, grade crossings were unavoidable, principally because of financial considerations. Funds simply could not have been obtained to have built the railroads at all, if from the outset the costs of actual construction had been augmented because of mandatory requirements that all road crossings be separated. Consequently, and for many years, grade crossings were accepted as a necessary incident of the existence and growth of the rail transportation system; so that in the earlier stages of railroad construction and expansion, and for some time thereafter, there was little agitation for grade separations.

This was due in large part to the fact that in that earlier period there were few, if any, through highways used for inter-city transportation. Traffic on the roads was almost entirely horse-drawn, and predominantly local in character. Through inter-city transportation was carried on principally by the railroads, supplemented to some extent by canal and river boats, and coastwise shipping. Consequently the interferences with highway vehicles, incident to the movement of trains and engines over grade crossings, were of little consequence except in the larger cities. As rail traffic increased in volume and frequency, with the growth of population and industry, and especially when railroad trains became faster as well as heavier and more frequent, the hazards at grade crossings became more substantial; so that when separations were demanded, the primary reason urged and recognized was the elimination of this hazard.

Even though the demand for a particular grade separation might be well justified, there was still to be deter-

mined the question of the allocation of the expense of its construction. On the one hand, there was the railroad, enjoying at the time a virtual monopoly of through transportation, whose train operations were generally recognized as the principal source of the dangers sought to be eliminated; on the other, the so-called vehicular public, whose small, slow-moving highway vehicles were by force of circumstances compelled to give way to the trains at the crossings. The situation is well summarized in the following language from the Court's opinion in the *Nashville* case:

> "The long distance traffic was served almost wholly by the railroads and the water lines. Under those conditions the occasion for separation of grades was mainly the danger incident to rail operations; and the promotion of safety was then the main purpose of grade separation. Then, it was reasonable to impose upon the railroad a large part of the cost of eliminating grade crossings; and the imposition was rarely a hardship." (294 U.S., p. 423)

Consequently, it was not illogical, when the question was first presented to this Court whether a railroad could be required by public authority to pay the cost of constructing a grade separation, that the Court should hold such a requirement to be valid under the Due-process Clause. Having in mind that the vehicles on the highway, to the extent that they handled any rail-bound traffic at all, served merely as feeders of traffic to the railroads, it was generally held that the power of the State to provide for the safety of the public was a sufficient answer to the railroad's claim that its property was being taken without due process of law. Compare: *Northern Pacific R. Co.* v. *Duluth*, 208 U.S. 583 (1907); *Missouri Pacific R. Co.* v. *Omaha*, 235 U.S. 121 (1914); *Erie R. Co.* v. *Board of Public Utility Commis-*

sioners, 254 U.S. 394 (1920). It may be noted that the two cases last cited are among those principally relied upon by the Commission, in its Decision No. 47344 in the *Santa Fe* case, and by reference, to support its conclusions in its case at bar.

The automobile and the motor-truck were developed as dependable means of transportation, during the period following about the year 1915, and at once came into widespread and increasing use. During the same period, the nation's system of hard-surfaced roads was expanded into the vast network that now reaches every part of the country. As a consequence there began to develop also a change of attitude toward the relative responsibilities of the railroads, on the one hand, and the users of the highways, on the other, in respect to grade-crossing separations. Although in many cases the factor of hazard continued to be the consideration publicly urged, it was recognized that the elimination of delays to and interferences with the constantly growing volume of highway traffic was the controlling reason, and the real justification, for the expenditure.

It should be noted, also, that in this period the necessity for a separation was rarely brought about by the construction of a new railroad or relocation of an existing railroad line. By 1925, the locations of the railroads had largely become fixed, and comparatively few new lines or extensions were thereafter built. Total railroad mileage in the United States reached its highest figure, 254,000, in 1916; but by 1935 had declined to 241,000. By contrast, highway mileage increased from approximately 153,000 in the early years of the century (1904), to approximately 3,000,000 in 1935, and since that time has increased still further. Motor-vehicle registration increased from about 55,000 in 1904, to 26,000,000 in 1935, and to more than 46,000,000 in 1952. Moreover, highways as well as motor vehicles have been

greatly improved. The modern multiple-lane "turnpike" or "express-way", which before 1920 was almost unknown, is now a commonplace, especially in the more heavily populated states. The record shows that highway development of this kind has been carried forward aggressively in the Los Angeles area; and that Los Feliz, though not itself a "freeway" as the term is locally understood, affords a direct connection to several highways of that general type.

2. *The Nashville Case:*

These revolutionary changes in the factors influencing grade separations were before this Court, and received its extended consideration, in *Nashville C. & St. L. Ry.* v. *Walters*, 294 U.S. 405 (1935).

That case involved the validity of an assessment for a grade separation, imposed pursuant to a Tennessee statute providing that in all such cases the railroad involved should contribute one-half of the over-all cost. The railroad challenged the assessment, on the ground that substantial and material changes had taken place, so that the considerations which previously had been held to justify such impositions were no longer controlling. The case had been tried in a lower court of the State, where, upon consideration of the extensive evidence introduced by the railroad, the assessment had been held invalid. The State Supreme Court refused, however, to consider the railroad's showing of special facts, or any of the arguments based thereon, and accordingly sustained the order. Upon appeal, this Court reversed that judgment.

The detailed opinion, rendered by Mr. Justice Brandeis, characterized the recent developments in the relation between rail and highway transportation as "the *revolutionary change* incident to transportation wrought in recent

years by the widespread introduction of motor vehicles".[4] On the basis of this sweeping development, he stated two major conclusions: (1) grade separations are no longer constructed primarily for reasons of safety, for the railroad has ceased to be the main cause of accidents; they are now essentially economic improvements designed to further the "uninterrupted, rapid movement by motor vehicles", and are comparable to widening the highway, removing curves, shortening distances, etc.; (2) the competitive position of the railroads, as against trucks, buses, and other users of the highways, has changed radically in recent years. The opinion states: "Separation of grades serves to intensify the motor competition and to further deplete rail traffic." (p. 423).

Thus to require a railroad to bear an arbitrary apportionment of the cost of a grade separation, which greatly exceeds the value of the benefit it receives, is to compel it to subsidize its powerful and aggressive competitors.

Having thus concluded that there had occurred a complete reversal of the positions and purposes of the parties in interest in grade separations, this Court held that a mere arbitrary assessment against the railroad of half of the cost of the separation could not be sustained against a claim

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[4] Only two years later, and shortly after it was given regulatory power over the transportation of property by motor carriers the Interstate Commerce Commission reported to the Congress as follows:

"Whether it realizes it or not, the country has in fact experienced *a transportation revolution* in a very short space of time. The automotive highway vehicle has been the principal factor in this revolution. In the carriage of persons, it is now by far the most important means of transportation, and in the carriage of property it is growing in importance every day." 52 Annual Report of ICC (1938), p. 17.

Earlier the Commission had said:

"Competition of the bus and truck is a development of recent years, but it is the most formidable which confronts the railroads." 45 Annual Report (1931), p. 98.

of lack of due process. The standard of allocation required by the Constitution was clearly stated as follows:

> "* * * But *when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to* the evils to be eradicated or *the advantages to be secured.* (Citations) While moneys raised by general taxation may constitutionally be applied to purposes from which the individual taxed may receive no benefit, and indeed, suffer serious detriment; (Citations) *so-called assessments for public improvements laid upon particular property owners are ordinarily constitutional only if based on benefits received by them* (Citations)." (294 U. S., at pp. 429-430.) (Emphasis supplied.)

The principle thus stated has never been modified or qualified in the least, by any later pronouncement by this or any other Court.

3. *The Action of the Commission:*

The Commission's refusal to recognize and apply the benefit principle in the instant case is difficult to understand or explain. For many years the Commission had uniformly followed the benefit principle, without substantial variation. As long ago as 1932 the Commission, in two decisions involving the proposed enlargement and reconstruction of existing separations, had referred to "the matter of direct financial benefits", as a consideration in the determination of the allocation of the costs, and had stressed the fact that the greatest benefits from these new improvements would accrue to the motoring public, which (as the Commission said) therefore should bear the greater cost (*San Bernardino Application,* 37 Cal. R.C. Reports 506, 509; *Los Angeles Application,* 37 Cal. R.C. Reports 784, 787). In

1933, in a decision already referred to, the Commission went further, and stated and adopted the benefit principle wholeheartedly: *Goshen Junction Separation,* 38 Cal. R.C. 380 (1933). In language very similar to that employed by this Court in the *Nashville* case, the Commission said:

> "In allocating the costs here *we are departing from the practice which has obtained generally heretofore of assessing one-half to each the public and the railroad* in case of an existing grade crossing. While this procedure has appeared equitable in the past *the tremendous changes in transportation conditions make necessary a reappraisement of the liabilities of the two parties at interest.* The railroad still continues to be the aggressor in preventing the free and unhampered use of the public thoroughfare, but the needs of the traffic on the highway have not only increased and changed in nature, but the use of the highway has become in large measure directly competitive with the rail line. These and incidental conditions following them have changed the benefits flowing from the separation of grades between these two great avenues of traffic.
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> "After carefully considering all the evidence in these proceedings, it is concluded that the order should authorize the grade separation, as proposed, and fix the amount to be contributed by the railroad in a lump sum *based upon direct and indirect benefits.* * * * " (38 C.R.C. Repts., at p. 386) (Emphasis supplied.)

In a series of three decisions later in the same year, the Commission affirmed its conclusions in the *Goshen* case (*Madrone Underpass,* 38 Cal. R.C. Reports 425; *Alta Overpass,* 38 Cal. R.C. Reports 606; *El Monte Underpass,* 38 Cal. R.C. Reports 612). Thus, the Commission established a policy and rule which continued to prevail in California for more than 16 years; i.e., until the Commission rendered its

first decision (No. 43374, October 4, 1949, 49 Cal. P.U.C. Reports 147) in the *Santa Fe* case.[5]

During that period, appellant and its system lines in California were parties to 104 proceedings involving grade separations. In each case the question of cost allocation was settled on the benefit basis. In most instances such settlements were by agreement between the railroad and the public authority; but in a limited number of cases the question was referred to and determined by the Commission. Each allocation, including those accomplished by agreement, was required to be, and in fact was, approved by formal order of the Commission. So far as appears from the public record of these proceedings, no difficulty was encountered during all this period in making allocations on the benefit basis, nor was the principle ever seriously challenged.

The Commission's rejection here of the benefit principle, when invoked *by the railroad*, is the more difficult to understand and explain, in the light of the Commission's recognition, in this *same* decision, of the *same* principle, when invoked and relied upon *by the State Department of Public Works*. As the opinion shows (Appendix A, *infra;* 51 Cal. P.U.C. Reports, at p. 790) the representative of the Department contended "that since the separation would not be of any *benefit* to a state highway nor *benefit* the nearest state highway", the Commission had no jurisdiction to impose any portion of the costs on the Department; and the Commission found (although erroneously, as its own opinion shows) that the construction did not "concern a state high-

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[5] As previously stated, the Commission's Decision No. 47344, on rehearing in that same proceeding, was rendered on June 24, 1952, 51 Cal. P.U.C. Reports 771; and is cited in the decision of the Commission in the instant case. See Appendix A, and 51 Cal. P.U.C. Reports, at page 795. The Supreme Court of California denied the Santa Fe's petition for writ of review, and the railroad thereupon appealed to this Court, the order allowing the appeal having been signed on February 26, 1953.

way"; and held that "accordingly, the Department * * * is not directly involved".

The Commission offered no reason for its refusal to apply the benefit principle similarly in fixing the railroad's contribution, except to state that its power to allocate costs was an exercise of the police power of the State, and therefore it was "not bound to follow the so-called benefits theory". The Commission did not (and, in view of the evidence offered through its own Transportation Engineer, obviously could not) assert that there was any difficulty or hindrance to prevent an accurate estimate of the values of the benefits accruing to the several parties. In fact, in this same paragraph (51 Cal. P.U.C. Reports, p. 796) the Commission referred to its own previous summary of the testimony setting forth these estimated benefits. Moreover, the Commission affirmatively stated, on the same page, that the "great increase in automotive vehicular traffic is one of the reasons for constructing a grade separation"; and, by its reference to the testimony establishing the economic justification of the separation, made it clear that in fact the furtherance of the speedy and unimpeded movement of motor traffic was the primary and controlling reason.

It should be added that, emphatically, elimination of alleged hazards at the crossing was not urged, nor declared, or apparently believed, to be of material significance. The exhibit prepared by the several parties jointly, including the Commission's own Transportation Department, which is reproduced in part at pages 86-91 of the Appendix to appellant's petition for writ of review, shows that only 14 collisions between trains and motor vehicles occurred at the Los Feliz crossing, in a period of 25 years and three months (January 1, 1926, to March 31, 1951), and resulted in but ten injuries to persons (one of which was fatal). On the basis of the actual volume of motor traffic moving over the

crossing (which increased from about 14,000 vehicles per day in 1925, to 27,000 per day in 1951), the computed actual hazard of collision between a vehicle and a train is less than one in 13,000,000; the mathematical chance of personal injury, due to such a collision, is less than one in 36,000,000.

Thus the Commission is in the completely inconsistent position of acknowledging here the existence, on a much greater scale, of the very conditions which in 1932-33 convinced it of the correctness of the benefit principle; and of declaring in effect, in a single paragraph of its opinion, that although these conditions, now greatly accentuated, are a motivating reason for the separation, they are no reason at all for following the benefit principle *when urged by the railroad;* this, moreover, notwithstanding that in the next preceding paragraph the same principle, *when urged by a State agency,* is approved and applied. The same factors which *in 1933* were held to justify the sweeping modification of the prior general practice, in the light of a reappraisement of the respective liabilities of the parties, are *in 1952* wholly ignored; indeed, the great increase in population, and the tremendous increase in motor-vehicle traffic, are now asserted (Decision No. 47344, 51 Cal. P.U.C. Reports 771, 781, incorporated by reference in Decision No. 47420 in the case at bar, 51 Cal. P.U.C. Reports, p. 795; Exhibit A, *infra*) to present a *new* problem, which justifies a *retrogression* to the arbitrary basis discredited and discarded 20 years ago.

4. *The Present Position of the Railroads:*

The tremendous increase and intensification of highway traffic have worked the transformation of the highways, from the role of railroad feeders, into a vast independent transportation system, competitive with the railroads, and in many situations so completely effective as to force the

railroads to withdraw from the field. The trends noted in the *Nashville* opinion have continued and accelerated in the years since that decision was rendered. There is no question that the "revolutionary change", noted by this Court and the Interstate Commerce Commission,[6] has become progressively more extreme, as the following statistics illustrate.

In 1904 the highway mileage of the United States was 153,662; by 1949, the total had increased to 3,326,000. By comparison, total railroad mileage reached its highest figure, 254,000, in 1916; but by 1949, had declined to 225,000.

In 1904 there were in the United States only about *55,000* registered motor vehicles; but in 1935 there were over *26,000,000;* and in 1949, more than *44,000,000.* By comparison with this tremendous increase in motor vehicles, the total number of units of railroad equipment in service has actually declined. Passenger cars in service decreased 27 percent between 1916 and 1949. During the same period the number of locomotives in service decreased 34 percent, and the number of freight cars in service, 22 percent. While it is true that the cars and locomotives in service today are of much greater capacity, and generally capable of more continuous use, than in 1916, it is also true that automobiles, motor trucks, and motor buses are also greatly improved, and equally capable of much more continuous service. Consequently, the comparisons of the actual extent of the physical facilities of the competing highway and rail carriers demonstrate the continuing and uninterrupted growth of motor-vehicle transportation, and the corresponding relative decline of the competitive position of the railroads.

The increase in the proportion of all commercial traffic handled by motor vehicles has also been spectacular. In

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[6] See footnote 4, *ante.*

1925, the railroads hauled 77.4 percent of the commercial inter-city freight traffic, while the trucks hauled 2.1 percent. *Pacific Intermountain Express Co.—Control and Purchase*, 57 M.C.C. 341, 365. By 1940, the change noted in the *Nashville* case had become unmistakable. Railroad participation in total freight traffic had decreased to 62.3 percent, but the trucks had quadrupled their proportion, to 8.4 percent of the total. In 1950, the relevant figures showed a further decrease in the railroads' share of freight traffic, to a low point of 58.7 percent; while the trucks hauled 12.4 percent of the total inter-city freight traffic. *65th Annual Report of I.C.C.*, p. 20. This represented another increase of approximately 50 percent for the motor vehicle competitors of the railroads.

The shift of short-haul, local business to the trucks has been even more extreme. For example, in 1949, the steam railroads handled only 20.9 percent of California intrastate business; the highway carriers hauled 73.7 percent. What has happened in the field of passenger traffic is equally striking. The railroad percentage of the passenger traffic business, excluding that moving by private automobile, declined from 75.7 percent in 1926, to 62.1 percent in 1936, and 50.5 percent in 1950. *Report of Special Committee of National Association of Railroad and Utilities Commissioners*, dated November 11, 1952, p. 66. During this same period, the proportion hauled by the buses increased from 9.3 percent of the total in 1926, to 29 percent in 1936, and 33.8 percent in 1950. But the "revolution" has been most drastic in the shift of the railroad passenger business to the private automobile. In 1936, automobiles accounted for over 197 billion inter-city passenger miles; while in 1950 the total for automobiles was over 337 billion, which represents 84.34 percent of the total inter-city passenger miles for that year. (*Ibid.*) It is plain that the change which

the Court emphasized in the *Nashville* case has persisted and gained momentum in the years since.

In the *Nashville* case this Court also stressed the fact that in the days before motor vehicles became commercially important:

> "* * * the need for eliminating existing crossings, and the need of new highways free from grade crossings, arose usually from the growth of the community in which the grade separation was made; this growth was mainly the result of the transportation facilities offered through the railroad; the separation of grade crossings was a normal incident of the growth of rail operations; and as the highways were then feeders of rail traffic, the community's growth and every improvement of highway facilities benefited the railroad." 294 U.S., at p. 423.

While there has been a very significant growth of the community here involved in recent years,[7] that growth reflects and is reflected by the great increase in *highway* traffic. During the same period, on the other hand, railroad facilities have remained relatively static. In fact, appellant's annual reports to the California Commission show that in the last two decades appellant's train operations in freight and passenger service in California have actually declined by about 11 percent, comparing the totals of train-miles produced in the years 1949-51, with the corresponding figures for the years 1927-1929.

There is no possible justification, therefore, for the Commission's refusal to follow the principles enunciated in the *Nashville* case. On the contrary, the changes in the competitive picture since that time fortify the reasoning of

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[7] Census figures show that from 1930 to 1940, the population of the State of California increased by about 52 percent, and from 1940 to 1950 the increase was 53.3 percent. For Los Angeles County, the population growth from 1930 to 1950 was approximately 100 percent.

this Court, and compel adherence to the path marked by its decision in that case.

5. *Recent Informed Approach to the Problem:*

If continuing research and informed public opinion had cast doubt on the principles set out in the *Nashville* case, the Commission might have attempted to justify its action on the ground that reconsideration of the "relative benefit principle" is essential. The fact is, however, that critical appraisals of the grade-separation problem have clearly and unanimously approved this Court's recognition of the fundamental change in the relationship between railroad and highway traffic, and its effect upon allocation of the costs.

The most recent and complete study of the problem is a monograph published by the Stanford Research Institute.[8] Much that is there said is relevant to the problems here presented and is commended to the Court's attention. The Institute's approach may be indicated by this paragraph (at pp. 45-46):

> "The need for grade crossing improvements and eliminations arises only because of the demands of the various beneficiary groups for transportation service. In order to justify such improvements from an economic standpoint, it is necessary to take into account the demands of the various groups for the improvements. Sufficiently accurate measurements of the various demands can be determined by measuring the benefits each group at interest will derive from the improvements. The relative dollar values of these economic benefits must be the basis for distribution of the costs to each group."

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[8] *The Railway-Highway Grade Crossing Problem* (The Stanford University Press, 1952). Copies of this monograph are being furnished to the Clerk of this Court for its judicial notice.

The Institute dismisses the policy adopted by the Commission of assigning costs to the railroad on the basis of an arbitrary percentage of total costs as:

> "* * * no more realistic or economically sound than is an assumption that the economic nature and character of the grade crossing area, crossing usage, and highway development and usage may be identical as between grade crossings." (p. 47)

Other evidence of informed thinking on the subject is provided by the fact that Congress and a number of State legislatures have, since the *Nashville* case was decided, enacted statutes providing for allocation of grade-separation costs to the railroads on the benefit basis, generally with a maximum assessment upon the railroads of from 10 to 25 percent.[9] An Indiana Highway Commission official states that:

> "This legislation can be considered an indication of the trend of popular thought on this subject. Previous laws in Indiana required the railroads to bear one-half of the cost of such installations." Milner, *Danger or Delay*, 35 *National Safety News* (May, 1937) 11, 12.

It can hardly be denied, therefore, that in reverting to an arbitrary 50-percent allocation basis, the Commission has disregarded not only the governing declarations of this Court on the subject, but also the informed judgment of experts, and the "trend of popular thought on this subject".

In addition, and particularly in view of the magnitude of the problem presented, the rule applied by the Commission will clearly impose an undue, and ultimately intolerable burden on interstate commerce, contrary to the Commerce

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[9] Federal: Federal Aid Highway Act of 1944, 58 Stats. 838 (10%); Indiana (20%); Maryland (25%); Michigan (15%); New Jersey (15%); New Mexico (10%); New York (15%); Ohio (15%); West Virginia (10%).

Clause of the Constitution, and the National Transportation Policy, enacted by Congress to implement that Clause.[10]

In *King* v. *United States*, 344 U.S. 254, 262 (1952), this Court expressly recognized as a pressing problem in implementing the National Transportation Policy as to the railroads,

> "the growth of vigorous competition from automobiles and other forms of transportation which made it futile to compensate for the passenger deficit by increasing passenger rates."

The same competitive problem has also been emphasized by the Interstate Commerce Commission in connection with the diversion, particularly in recent years, of freight traffic from railroads to trucks and other carriers. *Ex Parte 168*, 276 I.C.C. 3, 46 (1949). This increasing competition, together with rising costs, has held the railroad to "substandard" rates of return, in spite of a series of post-war rate increases. *Ex Parte 175*, 284 I.C.C. 589, 612 (1952). These conditions have caused a Congressional Committee to express concern as to the "precarious financial position" of the railroads. Sub-Committee of the Senate Committee on Interstate and Foreign Commerce, *Sen. Rep. No. 1039, 82d Cong., 1st Sess.*, 46 (1951).

The imposition of grade-separation costs upon the railroads at once increases their operating costs and reduces those of highway carriers, thus improving the already

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[10] "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; * * * all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense." 54 Stat. 899 (1940).

strong competitive position of the latter. The Commission's new policy, if not reviewed by this Court, will thus impose expenses upon the railroads which simply cannot be met, thereby accentuating the difficulty of preserving an adequate national transportation system."[11]

6. *The Importance of this Appeal.*

The facts of this case are, of course, important in that they constitute the framework upon which is woven a question arising under the Constitution of the United States. They are also important, however, because they are characteristic of a development presently being experienced in every part of the nation. That development is the continuing rapid growth of truck, bus, and automobile traffic upon the highways, and the consequent pressure for the elimination of more and more grade crossings, and the construction of additional grade separations, solely for the purpose of speeding up and thus reducing the cost of the highway traffic. The following excerpts from the Commission's principal decision in this case (51 Cal. P.U.C. Reports, at p. 791; Appendix A, *infra*) summarize the evidence showing the essential reasons here assigned:

> "A portion of Exhibit No. 2, relating to the importance of the proposed grade separation and its relation to the freeway plan and to major highway arteries, was presented by the Planning Director of the City of Glendale. It was the testimony of this witness that *the proposed grade separation is of utmost importance due*

[11] Under the rigid formula now being applied by the Commission, the railroad is not only required to pay one-half the cost of the improvement, without regard to any benefits received, but as a large taxpayer of the city and state must participate substantially also in bearing the other half of the cost. This double burden is given emphasis by the facts recited by this Court in the *Nashville* case, that nearly 28% of the railroad's gross revenues is required annually to pay state and local taxes plus cost of maintaining its roadway, whereas commercial motor carriers moving on public roads pay not more than 7% of their gross revenues in state and local taxes. (294 U.S., at pp. 427-428.)

to the heavy population of the area and to the daily flow of vehicles and trains at that intersection. This grade separation project was number one on the priority list of the Los Angeles County Grade Crossing Committee in 1923, and the ensuing years have not decreased its importance. *Los Feliz Boulevard, according to this witness, has reached its capacity and at the present time is carrying an overload. This situation has made it urgent to effect the grade separation.* Exhibit No. 5 is a map showing the crossing herein considered and the adjoining area. * * *"

"The Principal Traffic Engineer of the City of Los Angeles presented testimony relating to the grade crossing and stated that, in his opinion, a grade separation was needed. He pointed out that *the stoppage of traffic at the railroad crossing at Los Feliz would cause a 'backlash' of traffic which would affect traffic on San Fernando Road.* The distance between the railroad crossing and San Fernando Road is approximately 820 feet, which distance is equivalent to a storage capacity of approximately 38 cars in each of the three lanes of traffic. Checks have disclosed that there are times when more than 38 automobiles in each lane are held up due to a train blocking the crossing and, as a result, the 'backlash' of these automobiles congests San Fernando Road. Therefore, in the opinion of this witness, *a grade separation would not only relieve congestion at this particular crossing but would also relieve congestion on San Fernando Road.*" (Emphasis added.)

It is, therefore, apparent that the real and controlling reason for the Los Feliz separation is simply to eliminate delays to and stoppages of motor-vehicle traffic, and thus to enable that traffic, much of it directly competitive with appellant's railroad, to move faster and at less expense.

As of December 15, 1949, there were 13,130 grade crossings in California; and as of the same date, 809 grade separations (*Highway Safety Investigation*, 1950: 50 Cal. P.U.C. Reports 29, 36). The conditions which impelled the

City of Glendale to present its proposal for the six-lane grade separation at Los Feliz are not confined to that location or even to that particular area; on the contrary, similar situations, of equal or even greater urgency and popular appeal, exist in nearly every community served by appellant, in not only California but also the seven other States traversed by its rails. In the 14 years, 1935-1949, the number of separations in California increased by 203, or at the rate of more than 14 per year; and since 1949 this rate of construction has been maintained, if not accelerated. In 1950, in the decision last above referred to, the Commission estimated that the complete separation of all main and branch-line grade crossings in the state (some 9788 in number at the time) would involve an expenditure of about *two and one-half billion dollars*. The results of the Commission's reversion to the arbitrary and inflexible rule of allocating 50 percent of the cost to the railroads thus assume tremendous importance—indeed, they threaten the very existence of the railroads, as financially solvent and stable institutions capable of rendering essential public services.

Conclusion

At the risk of repeating what may be obvious, we here emphasize that this appeal does not involve any question of the desirability or propriety of the Los Feliz separation, nor does it constitute any attempt by appellant to prevent or delay that construction. Appellant has never opposed the separation, nor regarded it as other than a worth-while improvement, primarily in the public interest and for the public benefit, from which appellant also will derive a well-defined, but relatively minor benefit. Appellant has been and is ready and willing to contribute on the basis of that benefit, in accordance with the principles stated by this Court in the *Nashville* case.

The broad question here is therefore whether the *Nashville* case is to be overruled and cast aside; for there can be no question that the Commission's decisions herein are directly in conflict with this Court's judgment in that case.

It is submitted that the appellate jurisdiction of the Court has been duly invoked; that the federal questions involved are substantial in merit, and of outstanding public importance; and that this Court's consideration of the appeal upon full briefs and arguments is therefore appropriate and essential.

Respectfully,

GEORGE L. BULAND
E. J. FOULDS
BURTON MASON
RANDOLPH KARR
Attorneys for Appellant

Dated: March 23, 1953.

APPENDIX A

DECISION NO. 47420, APPLICATION NO. 32385, CASE NO. 5327

(June 30, 1952).

[51 Cal. P.U.C. Reports 788]

The City of Glendale authorized and directed to construct Los Feliz Road at separated grades under certain Southern Pacific Company tracks, among which are the Valley and Coast Lines main line tracks. The Commission also determined allocable costs and apportioned 50% to Southern Pacific Company, 25% to Los Angeles County, 12½% each to the Cities of Los Angeles and Glendale.

[1] CROSSING—GRADE SEPARATIONS—DIVISION OF COSTS. The authority of the Commission to allocate costs stems primarily from Section 1202 of the Public Utilities Code and is an exercise of the police power. The Commission is not bound to follow the so-called "benefits" theory.

John H. Lauten, Assistant City Attorney, for the City of Glendale, petitioner. *Randolph H. Karr*, for Southern Pacific Company, respondent. *Roger Arnebergh*, Assistant Attorney, for the City of Los Angeles, and Councilman John C. Holland and Councilman Ernest E. Debs, and Hugo Winter of City Engineer's Office, and Mr. T. M. Chubb, Chief Engineer and General Manager of the Department of Public Utilities and Transportation; *Hodge L. Dolle* for Department of Public Works, and George Langsner, Engineer, John N. McLaurin for the Department of Public Works, and Herbert J. Williams, Department of Public Works; *Robert W. Walker* and *Joseph R. Cummins* for The Atchison, Topeka and Santa Fe Railway Company; *E. E. Bennett* for the Union Pacific Railroad Company; *Sam R. Kennedy*, Road Commissioner, County of Los Angeles, Charles W. Sprutte, Construction Engineer, Road Department of Los Angeles, for the County of Los Angeles; *John P. Commons* for the Regional Planning Commission, Los Angeles County; *H. F. Holley*, Assistant Chief Engineer

for the Auto Club of Southern California, for the Los Angeles County Grade Crossing Committee; *H. Allen Smith*, Assemblyman 43rd District, for the City of Glendale as a member of the California State Assembly, and *Fred G. Seig*, Legislative Representative, for the Order of Railway Conductors, interested parties. *Hal F. Wiggins* for the Commission staff.

OPINION

This matter concerns an existing grade crossing at the intersection of the tracks of the Southern Pacific Company and Los Feliz Road in Glendale and Los Feliz Boulevard in Los Angeles. The tracks, consisting of two standard gauge main tracks, one standard gauge passing track and two standard gauge yard tracks, run in a northwesterly-southeasterly direction, while Los Feliz, designated as a road in Glendale and a boulevard in Los Angeles, runs in a northeasterly-southwesterly direction. The boundary line between the two cities parallels the tracks in the area of the intersection. Four of the above-mentioned tracks are in Glendale, [789][12] and one, a yard track, is in Los Angeles. The grade crossing is designated as Crossing No. B-476.8, and the legal description of that portion in Glendale is as follows:

> That portion of the right-of-way (100 feet wide) of the Southern Pacific described in deeds recorded in Book 14094, page 214, and in Book 17837, page 49, Official Records in the office of the Recorder of Los Angeles County, California.

The legal description of that portion of the grade crossing in Los Angeles is as follows:

> A strip of land having a uniform width of 30 feet, its northeasterly line being coincident and identical with the southwesterly line of the Southern Pacific main line right-of-way (100 feet wide), said strip of land extending from the southeasterly line of Los Feliz (100 feet wide) to the northwesterly line of said Los Feliz.

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[12] Numbers in parentheses indicate pages of the official printed report.

Applicant, the City of Glendale, requests an order authorizing and requiring the construction of a grade separation at the above-described crossing and further requests that there be in the order a designation of the portions of the work and construction to be done by Glendale, Los Angeles and the Southern Pacific, respectively, as well as an allocation of the costs thereof.

Subsequent to the filing of the application on May 7, 1951, this Commission on September 25, 1951, issued an Order of Investigation to determine whether or not, "in the interest of public safety, convenience and necessity", the grade separation should be constructed and also to determine "the proportions in which the expense of constructing and maintaining such a separation shall be divided among the Southern Pacific Company, the City of Los Angeles, the City of Glendale, the County of Los Angeles, the Department of Public Works, Division of Highways, of the State of California, or other political subdivisions affected. * * * "

Public hearings were held in Los Angeles before Commissioner Huls and Examiner Syphers on October 3, November 1 and 29, 1951, during which evidence was adduced, and on the last-named date the matter was submitted with the parties being granted the right to file briefs. Briefs now have been filed and the matter is ready for decision.

At the outset of the hearings the City of Los Angeles introduced into evidence Exhibit No. 1, which is a copy of a resolution of the City Council of Los Angeles, dated October 1, 1951. This resolution adopted a report of a joint committee previously appointed by the council, which report states that since the proposed grade separation lies completely within the City of Glendale and that, therefore, the Public Utilities Commission has no jurisdiction to require the City of Los Angeles to pay any portion of the cost, nevertheless the City of Los Angeles is not opposed to a [790] Commission order which would allocate some costs to the City of Los Angeles subject to the City's agreeing to pay.

The representative of the Department of Public Works of the State of California stated the position of that depart-

ment to be that, since the proposed grade separation would not be of any benefit to a state highway nor benefit the nearest state highway which is approximately 1,000 feet away, the Public Utilities Commission is without jurisdiction to impose any portion of the costs on the Department of Public Works, Division of Highways.

The Chairman of the Board of Supervisors of Los Angeles County, during the course of the hearings, stated that in his opinion the County of Los Angeles would probably contribute to the cost of the proposed grade separation.

As a result of a prehearing conference, at which all of the parties hereto were represented, held prior to the commencement of the formal hearings, a committee was appointed to make a study and prepare an engineering report. This committee, under the chairmanship of the Chief Engineer of this Commission, presented such a report as Exhibit No. 2, various parts thereof being explained by various members of the committee during the course of the hearings.

The Chief Engineer of the Public Utilities Commission, in presenting the first part of this report, outlined the historical background of the matter in question. By Decision No. 17330, dated September 10, 1926, this Commission issued an order directing the elimination of the grade crossings at Los Feliz Boulevard (that here being considered) and also at Brand Boulevard. The decision recommended an underpass be constructed at each location. Subsequently, alleging that finances were not available for such construction, the parties requested dismissal of the proceedings and the matter was dismissed by Decision No. 27098, dated May 28, 1934.

By House Resolution No. 24 of the California Legislature, at its 1949 session, the Commission was directed to initiate proceedings with a view to obtaining grade separations at Los Feliz Boulevard, Glendale-Brand Boulevards, and Fletcher Drive. As a result of this resolution the President of the Public Utilities Commission transmitted a report to the Assembly, dated March 6, 1950, setting forth the results of an engineering study showing the estimated costs, economic justification, and problems of financing of the proposed grade separations. Subsequently, the Legis-

lature, by Assembly Concurrent Resolution No. 88 of the 1951 session directed the Commission to hold hearings on the Los Feliz crossing, and the Commission's investigation was instituted accordingly.

[791] A portion of Exhibit No. 2, relating to the importance of the proposed grade separation and its relation to the freeway plan and to major highway arteries, was presented by the Planning Director of the City of Glendale. It was the testimony of this witness that the proposed grade separation is of utmost importance due to the heavy population of the area and to the daily flow of vehicles and trains at that intersection. This grade separation project was number one on the priority list of the Los Angeles County Grade Crossing Committee in 1923, and the ensuing years have not decreased its importance. Los Feliz Boulevard, according to this witness, has reached its capacity and at the present time is carrying an overload. This situation has made it urgent to effect the grade separation. Exhibit No. 5 is a map showing the crossing herein considered and the adjoining area.

In connection with this testimony the City Engineer and Street Superintendent of the City of Glendale presented that part of Exhibit No. 2 relating to traffic checks which were made in the area of the present grade crossing. Likewise, this witness presented Exhibit No. 4, which is a more detailed study of these traffic checks. This exhibit shows the number of motor vehicles and the number of pedestrians at the crossing during 24-hour periods on June 17, 18, and 20, 1951, and also shows the delay in vehicles caused by freight trains during these same periods.

The Principal Traffic Engineer of the City of Los Angeles presented testimony relating to the grade crossing and stated that, in his opinion, a grade separation was needed. He pointed out that the stoppage of traffic at the railroad crossing at Los Feliz would cause a "backlash" of traffic which would affect traffic on San Fernando Road. The distance between the railroad crossing and San Fernando Road is approximately 820 feet, which distance is equivalent to a storage capacity of approximately 38 cars in each

of the three lanes of traffic. Checks have disclosed that there are times when more than 38 automobiles in each lane are held up due to a train blocking the crossing and, as a result, the "backlash" of these automobiles congests San Fernando Road. Therefore, in the opinion of this witness, a grade separation would not only relieve congestion at this particular crossing but would also relieve congestion on San Fernando Road.

The Assistant District Traffic Engineer of the California Division of Highways likewise presented testimony relating to a traffic count made for four hours during the evening peak on October 15 and four hours during the morning peak on October 16, 1951. As a result of this check it was the opinion of this witness that train movements across the existing crossing occasionally affect San Fernando Road traffic but are usually minor in effect. He was of the further opinion that the total benefits to Route No. 4 (San Fernando Road) due to the proposed grade separation [792] on Los Feliz Road would be negligible in amount. Exhibit No. 9 is a report of the study made by this witness.

The Street and Parkway Design Engineer of the Bureau of Engineering, City of Los Angeles, presented testimony as to that part of Exhibit No. 2 relating to the estimate of cost. Under the plan proposed, Los Feliz Boulevard is to pass under the Southern Pacific Company's tracks. There will be two 40-foot roadways separated by a median strip with five-foot sidewalks along each side of the boulevard. The structure will be 105 feet wide and the underpass will have 5% and 6% grades on the westerly and easterly approaches, respectively. During the course of construction there will be a full-width detour for traffic.

Three possible methods of handling the storm waters were studied and, in the opinion of this witness, the most desirable would be to construct a storm drain which would be a portion of a permanent drainage system in the area. The other two methods were a gravity storm drain in Los Feliz Boulevard and a storm drain based on a storage basin and limited outflow by pump to Los Feliz Boulevard. Inas-

much as the gravity storm drain was estimated to be the least expensive of the three methods, it was used in the estimate of costs presented. The summarized estimate of cost for the underpass is set out hereinbelow:

Bridge	$ 403,200
Streetwork (includes excavation, paving, sidewalk, curb, guardrail)	127,100
Outer highway (South side—between Gardena Ave. and Railroad St. in Glendale)	6,600
Proposed Street (between Fernando Ct. and Los Feliz Boulevard in Glendale)	11,500
Sanitary sewers	14,500
Storm drains	249,100
Retaining walls	52,000
Detour (Street)	28,800
Railroad shoofly	96,500
Railroad signal work	4,000
Right of way	497,000
Total	$1,490,300
Engineering & contingencies (15%)	223,500
Grand Total	$1,713,800

This witness also presented testimony as to the possibility of creating an overpass so that the street would go over the railroad but this method was found to be considerably more expensive than the underpass and accordingly was not recommended.

Exhibit No. 3 consists of photographs, maps, plans and profiles of the proposed grade separation.

A section of Exhibit No. 2, devoted to the economic justification for the proposed separation, was presented by a Supervising Transportation Engineer of the Public Utilities Commission. This portion of the study [793] purported to assign a monetary value to certain benefits which might accrue from the construction of this grade separation. The results of this study are set out hereinbelow:

Vehicular Delay	$57,362	
Railroad operation cost, gatemen, maintenance	14,053	
Accident damages paid by railroad	475	$71,890
Depreciation on railroad portion of structure	6,991	
Maintenance on same (Excluding track)	1,620	8,611
Net annual savings		$63,279
Above savings capitalized at 3%		$2,109,000
Above savings capitalized at 4%		1,582,000
Above savings capitalized at 5%		1,266,000

It should be noted that a bank official testified that the present cost to Southern Pacific to obtain money on a long-term basis is 5%.

While the foregoing study indicates that the railroad would receive monetary benefits from the construction of the proposed grade separation, this theory was contested by testimony presented by railroad witnesses. The Superintendent of the Los Angeles Division of the Southern Pacific Company testified that the separation of grade at this crossing would be of no benefit to the railroad. He pointed out that the passenger trains using the line do not need to block Los Feliz since they are main line trains and proceed through without any delay. While the passenger trains stop at the Glendale Station, there is ample room for westbound trains without affecting Los Feliz Boulevard, and the eastbound trains can be stopped so as to clear Los Feliz. Freight trains, according to the witness, normally do not stop at the Glendale Station, and he stated there is a company instruction that the maximum number of freight cars on any freight train in the Los Angeles Division be limited to 100 cars. The switching in this area is done during night hours and, according to the testimony of this witness, is of such a small amount that it causes no serious obstruction to traffic. This witness was of the further opinion that there would be no saving to the com-

pany in money paid to employees, for, although a grade separation might save a little time so far as the work of the yard crews is concerned, yet these same crews would be required to be on duty for the same number of hours as at present.

The Road Foreman of Engines of the Los Angeles Division of the Southern Pacific Company described the switching performed in the vicinity of the Los Feliz crossing, and corroborated the testimony of the above witness to the effect that a grade separation would be of no benefit to the railroad inasmuch as the switching movements are very short. He likewise corroborated the testimony that the expense to the railroad in the form of employees' wages would not decrease were a separation constructed.

[794] The last portion of Exhibit No. 2, relating to the Assistant to the Chief Engineer of the Southern Pacific Company. It was his testimony that the possibility of securing steel and other necessary metals and cement for the project was very uncertain. This witness also testified as to the estimated monetary benefits to the railroad through the construction of a separation, and concluded that the net annual benefit would amount to $5,917. These estimates are set out in Exhibit No. 20, and are listed hereinbelow:

Railroad operation cost (gatemen, maintenance)	$14,053	
Accident damages paid by RR	475	$14,528
Depreciation on RR portion of structure	$ 6,991	
Maintenance of same, excluding track	1,620	$ 8,611
Net annual benefit to railroad		$ 5,917

It will be noted that the figures of the Assistant Chief Engineer of the Southern Pacific Company are identical with those of the Supervising Engineer of the Public Utilities Commission except that the former has not included any estimate as to vehicular delay, it being his contention that the elimination of delay to motor vehicles would not be a benefit to the railroad. It was the opinion of this witness that the above estimated annual benefit to the

railroad, capitalized at 5%, should constitute the maximum amount which the Southern Pacific Company should be required to contribute to the cost of construction of the proposed overpass. This amount is $118,340.

This same witness presented testimony as to the drainage problem in the vicinity. It was his opinion that the drainage problem should be solved before any grade separation is contemplated. He pointed out that Exhibit No. 2 estimates the cost of storm drains to be $249,100. These costs should not be assessed to the structure. This witness further estimated that the storm drains could be constructed for $28,500 instead of the larger figure shown above. This would reduce the cost of the proposed structure from $1,713,800 to $1,460,155. Exhibit No. 21 shows these estimates. It should be noted that the storm drain proposed by this witness would provide drainage for the structure only. His estimate of the cost of this type of storm drain is set out hereinbelow:

Rainfall area, 125,630 sq. ft. Gallons per minute 1,650

Pumphouse & storage box	$15,500
Pumps & electric equipment	10,500
500' 18" RCP—in place—$5.00 lin. ft.	2,500
Total	$28,500

Further testimony relating to the drainage problem in this area was presented by an engineer of the Bureau of Engineering Storm Drain and Design Division of the City of Los Angeles. He presented Exhibits Nos. [795] 22 and 23, drainage maps of the area showing the elevations and the general slope. Concerning the estimate of the Engineer for the Southern Pacific Company as to a proposed drainage system consisting of a sump and pump which would cost approximately $28,500, this witness contended that that estimate did not include any allowance for maintenance and that, in his opinion, a gravity flow system would be more satisfactory and provide a safer drainage operation. This opinion was corroborated by additional testimony presented by the Street and Parkway Design

Engineer of the Bureau of Engineering of the City of Los Angeles.

The railroad presented testimony through its Lease Clerk showing historical data as to the railroad right of way in the area. Exhibit No. 10 shows that the Southern Pacific Company acquired the land in 1873, and exhibits Nos. 11 to 15, inclusive, relate to various deeds and indentures concerning the property rights of way and easements in the area. Additional testimony in this respect was presented by the Chief Draftsman of the Southern Pacific Company which tended to show that the railroad was established in the area prior to the establishment of Los Feliz. It was stipulated between the parties that the grade crossing was first established some time between 1887 and 1912. Exhibits Nos. 16 to 18 are profile and strip maps of the railroad in that area, while Exhibit No. 19 is a blueprint showing the plan of the Southern Pacific Company's station at Glendale as of May 1951.

After a full consideration of all of the evidence and having the benefit of the briefs filed by the parties in this matter, we hereby find it to be in the interest of public safety, convenience and necessity and that it would be practicable to require the construction of a grade separation at the intersection of the tracks of the Southern Pacific Company and Los Feliz Road and that the plan prepared by the subcommittee, as presented in Exhibit No. 2 and hereinbefore described, sets out the construction which would be most practicable and would best meet the public safety, convenience and necessity in this matter.

Concerning the allocation of costs of this construction, we find from this record that the proposed construction does not concern a state highway and that, accordingly, the Department of Public Works of the State of California is not directly involved. However, we are cognizant of the position of the City of Los Angeles and of Los Angeles County, as stated during the course of the hearings.

While the railroad contended that the costs should be assessed according to the so-called "benefits" theory, we affirm our holding in Decision No. 47344, dated June 24, 1952, on Application No. 29396, wherein it was held that

[1] the authority of this Commission to allocate costs stems primarily from Section 1202 of the Public Utilities Code and is an exercise of the police power on the part of the State of Califorina through the medium of its agency, the Public Utilities Commission. Therefore, we are [796] not bound to follow the so-called "benefits" theory, although it is appropriate to observe that the proposed grade separation will obviously be of benefit to the railroad. Both the testimony of the Supervising Transportation Engineer of the Public Utilities Commission and of the Assistant to the Chief Engineer of the Southern Pacific Company, as set out hereinbefore, show various estimated benefits. The City of Glendale in its brief takes the position that, in the absence of the railroad, the present highway would be adequate and no grade separation would be necessary. Therefore, that City contends that all of the costs should be borne by the railroad. We do not subscribe to this contention, for the evidence shows that the great increase in automotive vehicular traffic is one of the reasons for constructing a grade separation.

According to the evidence the estimated cost of the entire project amounts to $1,713,800. Of this amount, $249,100 is for a gravity storm drain extending from a point easterly of the underpass to the Los Angeles River. Another estimate submitted showed that a sump and pump storm drain for the structure alone could be constructed for $28,500. We are of the opinion and hereby find that, while the more elaborate gravity storm drain is a desirable construction, yet it would provide draining for more than the structure area. Accordingly, the entire cost of such a storm drain should not be included in any costs which are apportioned to the railroad. Deducting the difference in cost of the storm drains, the allocable cost of the structure is hereby found to be $1,493,200. This amount of the cost should be allocated amongst the Southern Pacific Company, the Cities of Glendale and Los Angeles and the County of Los Angeles. In making an allocation of these costs we have in mind the contention of the City of Los Angeles on brief that the proposed grade separation would be entirely within the City of Glendale and that that City, therefore, should bear the

larger allocation so far as the municipal entities are concerned. Nevertheless, the evidence in this case shows that the westerly approach to the underpass will be in the City of Los Angeles and further that all of the traffic using this underpass either goes to or from the City of Los Angeles. In addition, one of the spur tracks which is directly involved is now within the City of Los Angeles. We likewise have in mind the position of the Chairman of the Board of Supervisors of the County of Los Angeles to the effect that the County would probably contribute to the cost. Therefore, in view of all of the evidence in this case and considering the positions of the respective parties hereto, we hereby find that, of the allocable cost of $1,493,200, the Southern Pacific Company should bear 50 percent, or $746,000, the County of Los Angeles 25 per cent, or $373,300, and the Cities of Glendale and Los Angeles 12½ per cent each, or $186,650 apiece.

ORDER [797]

Application as above entitled having been filed, public hearings having been held thereon, and the Commission being fully advised in the premises,

IT IS ORDERED that the City of Glendale be authorized and it hereby is directed to separate the grades of Los Feliz Road and the tracks of the Southern Pacific Company in the manner and at the location more particularly described in the foregoing opinion and substantially in accordance with the plan introduced in this proceeding, subject to the following conditions:

1. Of the total cost of the proposed structure, as set out in the foregoing opinion which is estimated to be $1,493,200, fifty per cent (50%) shall be borne by the Southern Pacific Company, twenty-five per cent (25%) by the County of Los Angeles, twelve and one-half per cent (12½%) by the City of Glendale, and twelve and one-half per cent (12½%) by the City of Los Angeles.

2. Upon completion of the construction of said grade separation, the cost of maintaining those portions of the separation, which for the purpose of this decision

shall be referred to as the superstructure and be deemed to be everything above the bridge seats, shall be borne by the Southern Pacific Company. The remainder of the maintenance of the grade separation structure shall be borne by applicant.

3. The City of Glendale shall prepare detail plans and specifications for the construction of the grade separation, as referred to above, to carry Los Feliz Road under the tracks of Southern Pacific Company in the City of Glendale, the City of Glendale to submit said plans and specifications to the other interested parties and to the Commission for its approval within one hundred and twenty (120) days from the date hereof. Should they fail to agree on the plans, such disagreement shall be reported to the Commission, whereupon an appropriate order will be entered.

4. The City of Glendale shall undertake the construction of the separation referred to herein and upon receiving the approval of the Commission of the plans to be submitted, shall begin construction of the separation and shall be responsible for its completion.

5. Upon completion of the various phases of this project as the monies become payable and upon the presentation of proper bills therefor, the County of Los Angeles, the City of Los Angeles, and the Southern Pacific Company shall pay to the City of Glendale the costs apportioned to said agencies by this order.

6. The grade separation structure shall be constructed with clearances conforming to the provisions of General Order No. 26-D of this Commission.

7. The construction herein ordered shall be commenced within one year and completed within two years after the date hereof, unless further time is granted by subsequent order.

[798]

8. Within thirty (30) days thereafter, applicant shall notify this Commission in writing of the completion of the construction of said grade separation and of its compliance with the conditions hereof.

The effective date of this order shall be twenty (20) days after the date hereof.

Dated at San Francisco, California, this 30th day of June, 1952.

MITTELSTAEDT, HULS, POTTER, MITCHELL,
Commissioners.

COMMISSIONER JUSTUS F. CRAEMER, being necessarily absent, did not participate in the disposition of this proceeding.

APPENDIX B

DECISION NO. 47597

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

APPLICATION No. 32385

In the Matter of the Application of the CITY OF GLENDALE, a municipal corporation, for an order or orders authorizing and requiring the construction of a grade separation of the crossing of Los Feliz Road and the railroad of the SOUTHERN PACIFIC COMPANY, designating the portions of the work to be done respectively by said City, THE CITY OF LOS ANGELES and said railroad corporation, and allocating the cost thereof among said Cities and said railroad corporation.

CASE No. 5327

In the Matter of the Investigation on the Commission's own motion as to the necessity of effecting a grade separation between the tracks of the Southern Pacific Company and Los Feliz Boulevard in the cities of Los Angeles and Glendale, County of Los Angeles, State of California, and the division among the affected parties of the cost incident to such separation.

ORDER DENYING REHEARING AND MODIFYING DECISION

Southern Pacific Company having filed its petition for rehearing respecting Decision No. 47420, rendered herein,

the Commission having considered said petition and being of the opinion that no cause has been shown for granting the same,

IT IS ORDERED that said petition for rehearing be and the same is hereby denied.

Decision No. 47420 is hereby modified by substituting "spur track" for "yard track" on line 11 at page 2, thereof, and by substituting "746,600" for "$746,000" on line 26 at page 15 of said decision.

Dated, San Francisco, California, this 19th day of August, 1952.

R. E. MITTELSTAEDT,
President.
JUSTUS F. CRAEMER,
HAROLD P. HULS,
PETER E. MITCHELL,
Commissioners.

Commissioner Kenneth Potter, being necessarily absent, did not participate in the disposition of this proceeding.

APPENDIX C

SUPREME COURT OF THE STATE OF CALIFORNIA
San Francisco, March 9, 1953

In Bank. S F 18704

SOUTHERN PACIFIC COMPANY

v.

PUBLIC UTILITIES COMMISSION

Petition for writ of review denied. Edmonds, J., and Schauer, J., are of the opinion that the petition should be granted.

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APR 27 1953
HAROLD B. WILEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 73

SOUTHERN PACIFIC COMPANY, a corporation,
Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and E. E. STEVENSTADT, JUSTUS F. CRAEMER, HAROLD P. HUBE, KENNETH POTTER and PETER E. MITCHELL, as members of and constituting said Commission,
Appellees.

Brief in Opposition to Motions to Dismiss or Affirm

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 739

SOUTHERN PACIFIC COMPANY, a corporation,
Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and R. E. MITTELSTAEDT, JUSTUS F. CRAEMER, HAROLD P. HULS, KENNETH POTTER and PETER E. MITCHELL, as members of and constituting said Commission,
Appellees.

Brief in Opposition to Motions to Dismiss or Affirm

Statements in opposition to jurisdiction, and motions to dismiss or affirm, have been filed by the Public Utilities Commission of California and its individual members, the appellees above named, and also by the Cities of Los Angeles and Glendale, as "real parties in interest" to the proceedings which have led to this appeal. This brief is submitted in reply and opposition to these motions, as contemplated by Rule 7(3) of the Rules of this Court.

The arguments presented by appellees[1] in their opposing statements may properly be discussed under three headings: (1) The actual basis of the challenged order of the Commission; (2) The attempted distinction of the *Nashville case;* and (3) The statutory jurisdiction of this Court on this appeal.

1. THE ACTUAL BASIS OF THE COMMISSION'S ORDERS.

In its Jurisdictional Statement, appellant has emphasized that this Court, in its latest decision dealing with the question of the allocation of the costs of grade separations, *Nashville C. & St. L. Ry. v. Walters,* 294 U.S. 405, stated and applied the "benefit principle": i.e., that under conditions as they now exist, contributions assessed against railroads for such improvements are "constitutional only if based on benefits received by them" (294 U.S., p. 430). Appellant also pointed out that the Commission had refused to accept or follow that principle, in determining the amount to be allocated against *the appellant railroad*[2], and had declared that it was "not bound to follow the so-called 'benefits' theory" (Jurisdictional Statement, Appendix A; 51 Cal. P.U.C., p. 796).

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(1) For convenience, the Commission (and its members) and the Cities are collectively referred to herein as Appellees.

(2) In this same decision, the benefit principle was actually followed by the Commission for the limited purpose of determining whether the Highway Division of the *State Department of Public Works* should be required to contribute: i.e. the Commission cited and accepted the testimony and argument of representatives of the Department that the proposed separation would not *benefit* any state highway (51 Cal. P.U.C., p. 790), and that the total *benefits* to the nearby state highway (San Fernando Road) would be negligible (pp. 791-792), and on this basis held that the *State Department* was therefore *not involved* (p. 795), and should not contribute.

In rejecting appellant's contention for the benefit principle, the Commission in its opinion herein cited its then recent Decision No. 47344, 51 Cal. P.U.C. 771 (June 24, 1952), involving similar issues, in which it had undertaken to distinguish the *Nashville case*, and had cited a group of earlier decisions of this Court as authority for its refusal to recognize benefits. Those decisions, which had been rendered prior to this Court's recognition (294 U.S., at pp. 416, 421-423, 426-428) of the "revolutionary developments" in the transportation field, had given approval to the allocation of substantial proportions and even the entire costs of separations to the railroads, largely on the theory that such separations were essential for *safety* reasons; i.e., the protection of the public against grade-crossing *hazards* created by the railroads.

Notwithstanding this forthright position in the Commission's decision, the authors of its Statement in Opposition apparently seek to intimate to this Court that the Commission, in making the 50% allocation to appellant, has given substantial consideration to the benefits which appellant will receive; and thus to convey the impression that this case actually presents no real dispute over the benefit *principle*, but rather a mere difference of opinion as to the *methods and details* of its application to an individual case.

Thus, for example, it is asserted on behalf of the Commission (at p. 8 of the typewritten draft of the Statement in Opposition) that appellant concedes the desirability and propriety of the proposed separation, and "admits the public interest and overall benefits in which it automatically shares, but objects to the Commission's four-way allocation of costs among the beneficiaries directly involved." It is also

claimed that appellant has admitted "the elimination of" various delays (including delay to trains), but has asserted that it (appellant) cannot benefit therefrom; and that appellant has proceeded "upon a so-called benefits theory to whittle away its proportional allocation to a paltry minimum, which latter it has described to this Court as being 'a contribution against will' ".

The sum total of these attempts to minimize the substantial differences between the appellant and the Commission is almost as misleading as an outright misstatement. Appellant has conceded that the proposed separation is desirable and proper, *for the primary benefit of the motoring public* using the affected streets and roadways; but only to a relatively slight extent for appellant's benefit. Contrary to the Commission's statement, appellant has not objected *generally* to the four-way allocation of costs among the beneficiaries, but only because its own share is so much (i.e., over five times) *more* than would be proper on the basis of the Commission's own calculation of the relative benefits (Jurisdictional Statement, Appendix A; 51 Cal. P.U.C., p. 793). That calculation shows the capitalized value of appellant's benefits to be $118,340; and far from treating this sum as a contribution unwillingly exacted, appellant has stated that it does not object to making the payment as its proper share of the total cost. Appellant's specific objection is thus to the payment of $627,260 *in addition;* but even more, appellant objects to and challenges the Commission's arbitrary rejection of the benefit principle, both generally, and particularly in this case, where as a matter of record the actual benefits have been so readily and accurately determined.

The Commission's reference (at line 16-24, p. 9, of its typewritten Statement in Opposition) to the "net annual savings of $63,279", assertedly developed by its staff studies as being the measure of the benefits flowing from the separation, is so worded as to carry the apparent intendment that this entire amount represents a potential saving for the railroad (appellant). Actually, the Commission's own staff studies (of record) also show, but the Commission omits to mention, that $57,362, or about 90%, of this "net saving" represents the computed value of delays to automotive traffic on the roadway, occurring when the present grade-crossing is obstructed by the passage of trains. This figure, developed and computed on the basis of actual checks made at the crossing (see pp. 87, 88, 90 of the Appendix to Appellant's Petition to the Supreme Court of California for Writ of Review), accurately represents the actual value of the benefits which motorists (including truck and bus operators) on the roadway will receive when the separation is built. It may also be noted that this figure does not include any allowance for the benefit to the motorists from the elimination of hazards, and of costs incident to accidents at the crossing; but that omission is of slight consequence, since with the present warning devices the hazard to motor traffic is negligible.

This transparent effort to confuse this Court as to the true character and basis of the challenged decision is repeated in the body of the Commission's argument, under the heading "No Substantial Federal Question is Presented". The statement there appears that "the Commission, in apportioning the cost of constructing the instant grade separation as between the several parties directly involved,

gave due consideration to the obligations of each, *as well as to the benefits derived.* (51 Cal. P.U.C. 771, 781)."[3] The only purpose that can be ascribed to this labored attempt at confusion is that the Commission now hopes to convince this Court that, notwithstanding the express language of the challenged decision, and its reliance upon its earlier decision in the *Santa Fe case*, it has not in fact abandoned or denounced the benefit principle in this case, but on the contrary has been largely guided by benefits; so that it may in this fashion escape judicial review to determine and resolve the conflict with the *Nashville case*.

So that there may be no doubt at all as to the real basis of the challenged decision, the Court may note that in the present case the Commission has made exactly the same 50% assessment against the railroad as in the *Santa Fe case*. In its Decision No. 47344 on rehearing in that case, the Commission declared, in language quoted in part in its Opposing Statement herein but, for some reason, not identified as having been taken from that opinion (51 Cal. P.U.C., pp. 781, 782):

> "The authority of this Commission to allocate costs, as designated in Section 1202 of the Public Utilities Code, supra, is an exercise of the police power on the part of the State of California through the medium of its agency, the Public Utilities Commission. We hold that the law is well established that under the exercise

(3) This volume and page reference is not to the principal decision challenged in the case at bar, but to the Commission's Decision No. 47344 of June 24, 1952, in the *Washington Boulevard* grade-separation matter involving the Santa Fe, now challenged before this Court in No. 667, October Term, 1952, *A. T. & S. F. Ry. Co. v. Public Utilities Commission, et al.* This reference can be taken as confirming that the Commission is here relying upon the same grounds as in that case.

of the police power a state may regulate the crossings of railroads with its highways, and may require grade separations to be erected and maintained, apportioning the costs in the exercise of its sound discretion * * *

"While we hold that the allocation of costs herein is an exercise of the police power, and that we are not bound to follow the benefit theory, we observe that this proposed improvement is not without benefits to the railroad."[4]

By affirming and repeating that ruling in the instant case, the Commission has thus treated these two companion cases as establishing a rule of law that benefits *to the railroad involved* need not be considered in allocating the costs of a grade separation. The Commission's two decisions, when read together, leave no doubt that the Commission itself regards the allocation against the appellant, here under challenge, as predicated not upon any consideration or measurement of benefits received by appellant, but solely upon its asserted authority, under the delegated police power, to make any apportionment it chooses without regard to constitutional limitations.

The confusion in which the authors of the Commission's Opposing Statement have place themselves, in their efforts to import into the Commission's decision some faint recognition of the benefit principle as contended for by appellant, is exemplified by the following excerpts from the Statement:

[1] "The Commission, in apportioning the cost of constructing the instant grade separation as between the several parties directly involved, *gave due consideration* * * * *to the benefits* derived * * * [2] By weight of

(4) Emphasis shown in quotations herein has been supplied, except as noted.

judicial decision * * * *the element of direct benefit is immaterial* * * * [3] *There is no* logical or legal *basis* for the contention *that the costs* of the Los Feliz grade separation *be borne by the parties* respectively *in accordance with the pecuniary benefits* derived by them [4] *nor are* any such *benefits mathematically calculable* * * * [5] By the great weight of judicial decision above cited, the *element of direct benefit is absolutely immaterial.* As stated by the Commission [6] *it is one of the factors for consideration* but not *necessarily* a controlling factor."

Thus, the authors of the Statement argue that the benefit principle has no logical or legal basis; that benefits are not susceptible of being mathematically calculated; that they are "absolutely immaterial"; and that notwithstanding all this, the Commission has stated that benefits are a "factor for consideration" (though not *necessarily* controlling), and here gave "due consideration to the benefits received".

Further comment upon this complex of bewilderment seems unnecessary; except that we may emphasize again that in stating the grounds for its decision, and even though it actually applied the benefit principle in order to agree with the argument advanced by the State Department of Public Works opposing any assessment *against the Department*, the Commission itself declared unmistakably, in making the allocation *against the railroad*, that it was exercising its own unfettered discretion, pursuant to the police power, and therefore "was not bound to follow the * * * benefits theory."

2. THE NASHVILLE CASE.

Both the Commission and the Cities attempted to avoid the application of this Court's decision in the *Nashville case*,

by describing it as a "single, unique and distinguishable case", which in their view should not be accepted as a guide except in cases involving grade separations in *rural areas*, upon *through inter-city* highways, and then only when these are constructed with the aid of federal funds. Appellees are at great pains, therefore, to point out that the Los Feliz separation involves an important traffic artery in the midst of the Los Angeles metropolitan area, with a population of several million, and does not involve and is not to be built with the aid of federal funds; from which it is argued that the constitutional principles stated by this Court in the *Nashville case* have no bearing.

It is quite true that in the *Nashville case* this Court directed its decision to the facts of the case then before it; and it is equally true that this is another case, involving another separation, and that certain of the factors are not the same. But the essential question for the Court's consideration here, which however appellees have conspicuously avoided in their discussion, relates to the factors in the *Nashville case* which persuaded this Court to conclude, notwithstanding the earlier decisions relied upon by the appellee in that case (and upon which the present appellees likewise strongly rely), that a new approach to the problem was required, and a new solution based upon benefits was therefore justified.

A decision of this Court, such as in the *Nashville case*, which marks a notable departure from an earlier trend of opinion, is not to be lightly dismissed as a mere aberration, or robbed of its value as a guiding statement of principle, on the theory that the factual situation there may have contained elements not present in earlier (or later) cases.

Appellant believes that the question as to the basis of this Court's conclusions in the *Nashville case*, and their applicability to the case at bar, is one which should receive the careful and reasoned study of this Court, upon full opportunity for briefs and argument by the parties.

In the approach to the study of this question, this Court should, we suggest, have in mind the following excerpt from the *Nashville* opinion, which served as an introduction to the Court's consideration of the principal issues:

> "The charge of arbitrariness is based primarily upon *the revolutionary changes incident to transportation wrought in recent years* by the wide-spread introduction of motor vehicles; the assumption by the Federal Government of the functions of road builder; *the resulting depletion of rail revenues; the change in the character, the construction and the use of the highways; the change in the occasion for elimination of grade crossings*, in the purpose of such elimination, and *in the chief beneficiaries* thereof; and *the change* in *the relative responsibility of the railroads and vehicles moving on the highways as elements of danger* and causes of accidents." (294 U.S., p. 416).

All of these revolutionary changes, already well advanced at the time of the *Nashville* decision, have continued to develop and progress. The systems of through highways and "free-ways" are constantly being developed and expanded all over the United States, and particularly (as shown by this record) in the Los Angeles metropolitan area. In the latter area Los Feliz is conceded to be one of the most important arteries. The State and City highways and roadways in the Los Angeles region connect with, supplement and thus become an essential part of the national highway

system. Los Feliz is thus an inseparable and integral part of that system. The effects upon the railroads, and notably upon appellant as the railroad carrier having the largest mileage and the largest volume of traffic in California, have therefore been of the same kind as remarked by this Court in the *Nashville* case, but much more extensive and substantial. The factors recited in the Court's opinion are precisely those upon which appellant relied in the proceedings below, and now predicates this appeal. The passage of the years since the *Nashville* decision has not changed the essential reasons which, in that case, convinced this Court that an arbitrary allocation should not be sustained; instead those reasons have become much more forceful and compelling.

To indicate how completely the occasion and purpose of the Los Feliz grade-crossing elimination are the "furtherance of the uninterrupted, rapid movement of motor vehicle traffic"; and, correspondingly, that the elimination is not warranted because of accidents or any substantial hazard thereof: reference may be had to the showing made *by the Commission and the Cities* in the proceedings before the Commission.

Exhibit 2 in those proceedings was jointly prepared by representatives of the several parties *and the Commission*, and was introduced by the Commission's Chief Transportation Engineer. This exhibit showed, among other things, that in 1951 the average daily movement over the crossing was about 27,000 motor vehicles: this figure including about 1105 trucks (other than light panel trucks), and 193 buses. The exhibit also showed that the computed cost of the delays incurred by vehicles at the crossing was $57,362 per year.

Of this figure, $5,174 represented the cost of the delays incurred by trucks and buses. These figures were among those advanced and relied upon as the "economic justification of the separation."

The same exhibit also showed that in the entire period of 25 years and 3 months, January 1, 1926 to March 31, 1951, only 14 collisions between trains and highway vehicles occurred at the crossing; an average of one such accident every 21½ months. One death, and 9 non-fatal injuries, were sustained in these collisions; an average of one casualty every 30 months. The mathematical likelihood of a collision is thus less than one in 13,000,000; of a personal injury, about one in 37,000,000.

The Planning Director of the City of Glendale testified that Los Feliz is a road of great importance, connecting numerous heavily populated centers in southern California; that it also connects with many free-ways, and that numerous major traffic arteries are tributary to it; and he listed some 26 actual major roadways in this group, including U. S. Highway 99, the principal inland highway along the Pacific coast from Mexico to Canada, and U. S. 66, a major transcontinental route from southern California to St. Louis and Chicago. He also testified that Los Feliz is a very important segment of the complete highway plan for southern California; that the most densely populated areas of Los Angeles County use Los Feliz; and that delay and inconvenience to vehicular traffic at the crossing cause enormous economic loss. He referred also to interference with traffic on San Fernando Road, a nearby State Highway carrying some 40,000 vehicles per day, occasioned whenever Los Feliz is blocked and its traffic is backed up into the San Fernando intersection, 850 feet from the grade crossing.

The Principal Traffic Engineer of the City of Los Angeles testified that in the future Los Feliz will carry a great deal more traffic than at present, and even worse "tie-ups" will result unless the separation is built. He declared that Glendale will benefit from the separation principally because the blocking of Los Feliz and San Fernando Road (the State Highway), will be eliminated. Presently, he said, Los Feliz is being used up to about 50% of its potential; but with the expected population increase, the completion of various free-ways, and improvement of other roadways, the traffic on Los Feliz will be greatly increased.

Thus there is presented this situation: the highway traffic volume over the crossing has practically doubled, in a period of 25 years; a substantial percentage, both in volume and from the standpoint of ultimate benefits, consists of commercial vehicles; the roadway involved is a very important arterial connection, and a major segment of the master highway plan of the area; the proposed 6-lane grade separation is asserted to be essential, to accommodate the constantly increasing and much heavier traffic now confidently predicted; the elimination of grade-crossing collisions has not been and, on the record could not reasonably be, urged as even a subsidiary reason to justify the separation; the primary, and indeed the sole, purpose and justification are the furtherance of the uninterrupted, rapid movement of this heavy volume of motor-vehicle traffic.

The asserted factual distinctions, upon which appellees rest their argument, amount to no more than that in the *Nashville* case the grade-separation was for the purpose of promoting the free movement of motor traffic on a through highway, outside of the limits of a heavily populated metro-

politan area; whereas the Los Feliz separation, although admittedly for the same primary purposes, is located within such an area. In this case, as in that one, through inter-city commercial traffic, as well as local traffic, will use the separation, and receive substantial benefits from that use.

Note has already been taken of the Commission's statement that benefits from a grade separation are not "mathematically calculable"; the assertion being offered apparently as a further criticism of appellant's reliance upon the *Nashville* case. The Commission's own opinion and decision in the present case demonstrate the fallacy of this assertion. Actual benefits to the motoring public (and the railroad) were carefully calculated, and a statement thereof was incorporated in the co-operative exhibit above referred to. As indicated, these computations were for the purpose of showing the "economic justification" of the separation: i.e., *the monetary values of the benefits* to be derived from its construction. This showing was accepted and, apparently, relied upon by the Commission to support its conclusion that the separation was justified. In fact, the essential figures thus developed are reproduced in the text of the decision itself (51 Cal. P.U.C., p. 793). To say that benefits cannot be calculated, when in fact such calculations have been presented and used in this very case, is so transparently erroneous that further comment is not needed. We may emphasize again, however, that as mentioned in the Statement as to Jurisdiction, the benefit principle was followed by the Commission for about 16 years following its adoption, on Jan. 16, 1933 in the *Goshen Junction* case, 38 Cal. R.C. 380; and without any apparent difficulty.

The Commission, in its Opposing Statement (at p. 14), refers to the *Goshen case*, but cites also in that connection its Decision No. 25069 of August 15, 1932 (i.e., several months prior to the *Goshen case*), and says that the 1932 decision repudiated the "benefits theory". The Commission omits, however, a paragraph of the opinion in No. 25069, which followed immediately after the excerpt quoted in its Statement, as follows:

> "There can be no question that *the vehicular public will receive the greatest benefit* from the widening of these separations, so *it logically follows that this class of the public should bear the greater portion* of the cost." (37 Cal. R.C. 784, 787).

Thus it will be seen that even prior to the *Goshen case*, and in the very decision in which, as it now says, it repudiated the benefits theory, the Commission actually recognized benefits as the appropriate basis for the allocation. It continued to follow and apply that same principle, from 1933, to and including 1949.

3. THE STATUTORY JURISDICTION OF THIS COURT ON THIS APPEAL.

The Cities argue at some length that this case does not come within this Court's appellate jurisdiction; in that appellant's challenge is directed solely to that portion of the Commission's order which allocates the cost to the several parties; and, so the Cities say, that portion is judicial (rather than legislative) in character, and therefore not a "state statute" within the meaning of Section 1257(2) of Title 28, *U. S. Code*.

The argument appears to concede that the challenged order, in so far as it declares the proposed separation to be

justified, and so authorizes it to be built, is legislative in character. Thus the contention is that although the provision apportioning costs was rendered at the *same* time, by the *same* agency, as part of the *same* purported disposition of the proceeding, and under authority of the *same* statutory provisions, it was nevertheless a pronouncement applying "to a completed transaction laws which were in force at the time" (*Ross v. Oregon*, 227 U.S. 150, 163); or which had "declared and enforced liabilities as they stand on present or past facts and under laws supposed already to exist" (*Prentis v. Atlantic C. L. Co.*, 211 U.S. 210, 226); and therefore judicial in nature.

The argument of the Cities does violence to the essential distinctions between judicial and legislative action, stated in the *Prentis* opinion. There the judicial function was identified with the enforcement of liabilities predicated on present or past facts, under laws already in existence. It being conceded that the order authorizing the construction is to that extent legislative in character, the argument that in other respects the order is judicial clearly has no basis. The "fact" upon which the respective "liabilities" of the parties are to be based is the construction of the separation; clearly a *future possibility*, not a *present* or *past fact*. The "law" under which those "liabilities" are to arise—the order authorizing the construction—is not yet actually in effect, the effective date thereof having been indefinitely postponed by the Commission (Decision No. 47819, dated October 14, 1952: see the Supplemental Appendix to Appellant's Reply to the Answers of the Appellees in the Supreme Court of California).

The principal order here challenged (Decision No. 47420) is in form and intent the result of a single quasi-legislative

process: the establishment of a "new rule to be applied thereafter" to the Los Felix grade-crossing, by providing for its separation, and necessarily for the manner in which the expense of the separation shall be borne.

This Court has uniformly considered orders of State Commissions similar in general import to the challenged order to be legislative in character. In *Grand Trunk Railway Co. v. Indiana Railroad Commission*, 221 U.S. 400, the challenge was directed to an order of a State Commission requiring the installation of protective devices at a railroad grade-crossing, and apportioning the expense. No claim was made that the Commission did not have power to order the proposed construction, or that the latter was not justified by the circumstances; the sole claim was that the apportionment of the expense was invalid, as an infringement of the Contract clause (of Article I, Section 10) of the Constitution. This Court said (p. 403):

> "* * * The order is a legislative act by an instrumentality of the State exercising delegated authority (*Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226), is of the same force as if made by the legislature, and so is a law of the State within the meaning of the contract clause of the Constitution (citations) * * *"

The *Grand Trunk* decision was cited in *Lake Erie & W. R. Co. v. Public Utilities Commission of Illinois*, 249 U.S. 422. There the railroad challenged an order of the State Commission which had directed the railroad, at its own expense, to restore a side-track which had been taken up, so as to resume service to an industry. As shown by the opinion in the Court below (277 Ill. 574, 115 N.E. 519), the order had been made under a state statute, empowering the

State Commission to order industry-track connection and service, and *to apportion the expense* between the railroad and the industry concerned. The challenge was directed to both phases of the order: i.e., not only the requirement for the physical construction, but also the assumption of the expense by the railroad. This Court said (p. 424):

> "Such an order, being legislative in its nature and made by an instrumentality of the State, is a State law within the meaning of the constitution of the United States and the Laws of Congress." (citations).

Among the cases cited, following the above quotation, was *Ross v. Oregon*, supra, the only decision of this Court referred to by the Cities in connection with this subdivision of their argument. It is apparent that this Court has heretofore considered the *Ross case*, in exactly the same connection in which it is now relied upon by the Cities, and has concluded that the holding therein, if in point at all, supports a view directly contrary to the Cities' present argument.

The Commission itself apparently has no doubts as to the legislative character of the portion of the order here under challenge. In the principal decision herein (No. 47420), it said (51 Cal. P.U.C., at p. 795):

> "While the railroad contended that the costs should be assessed according to the so-called 'benefits' theory, we affirm our holding in Decision No. 47344, dated June 24, 1952, on Application No. 29396, wherein it was held that *the authority of this Commission to allocate costs* stems primarily from Section 1202 of the Public Utilities Code and *is an exercise of the police power on the part of the State* of California through the medium of its agency, the Public Utilities Commission."

It may be noted that the Commission now affirms this expression, by quotation thereof at page 8 of its Statement Opposing Jurisdiction.

There is clearly no substantial basis in this Court's decisions for the jurisdictional objections now advanced by the Cities. But even if there were, and it should therefore be held that the appeal does not lie under Section 1257(2), the papers on appeal would be considered as a petition for certiorari, and thus the matter would be before this Court for due consideration. 28 *U. S. Code*, Section 2103.

CONCLUSION

The principal ground for appellees' motions to dismiss or affirm, and the only ground in which they actually concur, is that the *Nashville case* has no application here; that the case at bar is rather to be governed by the principles of older decisions, reflecting conditions as they existed before the "transportation revolution", following World War I, had brought about the sweeping changes recited in the *Nashville* opinion. Appellant believes that this Court's recognition, in that opinion, of the need for a new and different assessment of the relationships and obligations of rail and highway traffic, was not the mere window-dressing of a "single unique case", as appellees appear to contend, but instead a significant and controlling guide for the future.

It is respectfully submitted that the motions should be denied, and probable jurisdiction noted.

Dated: April 22, 1953

George L. Buland
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Due service and receipt of a copy of the within is hereby admitted this_____ day of April, 1953.

_____

Attorney for Appellee

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

1953

No. 23943

SOUTHERN PACIFIC COMPANY,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, R. E. MITTELSTAEDT, JUSTUS F. CRAEMER, ET AL., ETC.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM BY CITY OF LOS ANGELES AND CITY OF GLENDALE, REAL PARTIES IN INTEREST

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SOUTHERN PACIFIC COMPANY, A CORPORATION,
Petitioner-Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, R. E. MITTELSTAEDT, JUSTUS F. CRAEMER, HAROLD P. HULS, KENNETH POTTER AND PETER E. MITCHELL, AS MEMBERS OF AND CONSTITUTING SAID COMMISSION,
Respondents-Appellees

STATEMENT IN OPPOSITION TO APPELLANT'S ASSERTION OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM BY CITY OF LOS ANGELES AND CITY OF GLENDALE, REAL PARTIES IN INTEREST.

The City of Los Angeles, a municipal corporation, and the City of Glendale, a municipal corporation, were parties to the proceeding before the California Public Utilities Commission and are obligated by the final decree and judgment which has been appealed from in this proceeding to pay a percentage of the cost of constructing a grade separation. As real parties in interest, the two cities respectfully show the following in opposition to appellant's asser-

tion of the jurisdiction of the Supreme Court of the United States and in support of their motion to dismiss or affirm:

I

Issue on Appeal

Appellant's contention on appeal is that a railroad company's share of the allocated cost of a grade separation must be based upon benefit to the railroad arising from the absence of a crossing at grade at the point involved. Appellant relies upon *Nashville, Chattanooga & St. Louis Railway* v. *Walters* (1935), 294 U. S. 405. The California Public Utilities Commission held that in the exercise of the police power, "a state may regulate the crossings of railroads with its highways, and may require grade separations to be erected and maintained, apportioning the costs in the exercise of its sound discretion"; citing, *Erie Railroad Company* v. *Board of Public Utility Commissioners* (1920), 254 U. S. 394; *Chicago, Milwaukee and Saint Paul Railway Company* v. *Minneapolis* (1914), 232 U. S. 430; *Missouri Pacific Railway Company* v. *Omaha* (1914), 235 U. S. 121; and *Lehigh Valley Railroad Company* v. *Board of Public Utility Commissioners* (1928), 278 U. S. 24.

II

The Validity of a State Statute Is Not Involved in This Appeal

The assignment of errors and statement as to jurisdiction show that appellant's attack is not upon the order of the California Public Utilities Commission authorizing the cities to construct a grade separation. Appellant's attack is confined to the condition therein that the cost of the grade separation be allocated among the City of Glendale, City of Los Angeles, County of Los Angeles and ap-

pellant in the manner stated. That portion of the order under attack by appellant is not legislative in character and is not a statute of the state within the meaning of Section 1257(2) of Title 28 of the United States Code. Instead it is a judicial determination under the organic law of California.

Postal Telegraph-Cable Co. v. *Railroad Commission* (1925) 197 Cal. 426, 435, 438-439; 241 Pac. 81;
City of San Jose v. *Railroad Commission* (1917) 175 Cal. 284, 290-291; 165 Pac. 967;
Pacific Telephone Etc. Co. v. *Eshleman* (1913) 166 Cal. 640, 650; 137 Pac. 1119.

The authorities relied on by appellant do not support its contention that the statute involved in this case is the order of the California Public Utilities Commission. In the first case cited, *Lake Erie & Western Railroad Co.* v. *Public Utilities Commission* (1919), 249 U. S. 422, the appeal by the railroad attacks an order of the Public Utilities Commission requiring it to restore a spur track to a grain elevator, whereas in the case at bar the attack is directed only to the matter of allocating costs. The second case, *Live Oak Water Users' Association* v. *Railroad Commission of California* (1926), 269 U. S. 354, involved an order fixing the rates for service, thereby prescribing a rule relating to future service supplied by the utility. The third case, *Hamilton* v. *Regents of the University of California* (1934), 293 U. S. 245, involved an order of the Regents requiring students to take military training. As stated by the Court, at page 258, speaking through Mr. Justice Butler, "the assailed order prescribes a rule of conduct and applies to all students belonging to the defined class." In the case at bar the order complained of does not have the essential characteristics necessary to meet the requirement of legislative character present in the foregoing cases cited by appellant.

In the language of *Ross* v. *Oregon* (1913), 227 U. S. 150, 163:

> "Of course, the ruling here in question was by an instrumentality of the state; but as its purpose was not to prescribe a new law for the future, but only to apply to a completed transaction laws which were in force at the time, it is quite plain that the ruling was a judicial act, and not an exercise of legislative authority. As was said in *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 226, 53 L. ed. 150, 158, 29 Sup. Ct. Rep. 67: 'A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future, and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.'"

III

No Substantial Federal Question Is Presented

Appellant's sole reliance is upon *Nashville, Chattanooga & St. Louis Railway* v. *Walters* (*supra*), 294 U. S. 405. While appellant claims that the case is a departure from the earlier decisions of this Court, it is to be noted at the outset that the case cannot be so characterized. For, as stated on page 431, "no case involving like conditions has ever been found in any of the lower Federal courts; nor, excepting the case here under review, has any such been found among the decisions of the highest courts of any state." The grade separation there involved was required in order to provide an underpass for a new Federal-aid highway in a rural community of 1823 inhabitants located in a sparsely settled territory. There was little traffic on the highway. Five of the six trains operated daily each way passed between 10:00 o'clock P.M. and 6:00 o'clock A.M. when there was substantially no highway travel. The new highway and underpass were not for local transporta-

tion needs, but to serve as a link in the nation-wide system of super highways fostered by Congress in conjunction with the several states in the interest of commerce by motor vehicle. The existing grade crossing was not eliminated but remained to serve the local needs on the old street route. The trial court found that, "the decision to build this underpass, its location and construction was not in any proper sense an exercise of the police power," and "did not involve an exercise of the police power any more than many other features of this project such as elimination of curves, grades, widening the pavement, et cetera."

The Tennessee statute involved authorized the State Highway Commission in its discretion to require the elimination of grade crossings in the interest of safety. But the statute, as pointed out by this Court (p. 412), "without conferring upon the Commission any discretion as to the proportion of the cost to be borne by the railroad requires the latter to pay in every case, one-half of the total cost of the separation of grades."

The trial Court held the statutory apportionment of costs unconstitutional under the special facts of the case. On appeal, the Supreme Court of Tennessee, as pointed out at page 414, "declined to consider the special facts relied upon as showing that the order and statute as applied were arbitrary and unreasonable; and did not pass upon the question whether the evidence sustained those findings." The United States Supreme Court declined to pass upon the sufficiency of the foregoing facts to sustain appellant's contention that the statute and order based thereon were arbitrary and unreasonable. The holding of this Court in that case was (p. 428):

> "The Supreme Court of Tennessee erred in refusing to consider whether the facts relied upon by the Railway established as arbitrary and unreasonable the imposition upon it of one-half the cost of the under-

> pass. The promotion of public convenience will not justify requiring of a railroad, any more than of others, the expenditure of money, unless it can be shown that a duty to provide the particular convenience rests upon it."

The opinion goes on to state that, "state action imposing upon a railroad the cost of eliminating a dangerous grade crossing of an existing street may be valid although it appears that the improvement benefits commercial highway users who make no contribution toward its cost." The qualification of this general rule which was possibly applicable to the facts in the *Nashville* case is stated as follows (pp. 430, 431):

> "But in every case in which this Court has sustained the imposition, the new highway was an incident of the growth or development of the municipality in which it was located. . . . And in every such case the municipality apparently bore the cost of constructing the new highway for which grade separation was required."

The case at bar does not have any of the aspects which would bring it within the limitation upon the general rule of liability announced in the *Nashville* case. The record before the California Public Utilities Commission clearly shows a factual situation materially different from that which existed in the *Nashville* case. In the Answer and Brief of the City of Los Angeles and the City of Glendale, Real Parties in Interest, in Opposition to Issuance of Writ of Review, the following facts were set forth to supplement the facts contained in the Petition for Writ of Review (pp. 5-7):

> "In 1923, when the movement for a grade separation was first started, the traffic on Los Feliz was 16,000 vehicles per day at the grade crossing. [Ex. 2, p. 4.] Traffic counts conducted in 1951 indicated that the traffic load had increased to approximately 27,000 vehicles per day. [Ex. 2, p. 4.] Of the total number of

vehicles passing over the grade crossing, only a very small percentage were trucks and those trucks were engaged principally in local transportation. [Tr. 28, 126.] The buses which used the street were substantially all engaged in local transportation. [Tr. 125.] There was no evidence that vehicles using the street were in competition with the railroad, while there was evidence to the effect that many vehicles using the street were providing business for the railroad. [Tr. 66.] Testimony presented indicated that the public probably would continue to make increasing use of Los Feliz in the future despite construction of freeways in the metropolitan area. [Tr. 185.] Los Feliz is an important traffic artery connecting the Hollywood and West Los Angeles areas with the Glendale, La Crescenta Valley, Pasadena and San Gabriel Valley areas. [Ex. 2, p. 3.]

The present 70 to 76-foot roadway of Los Feliz is being used to approximately 50% of its designed capacity due to obstructions. [Tr. 182, 186, 193.] A point of congestion on Los Feliz at its intersection with Riverside Drive [Tr. 82, 92] will be eliminated with the construction of the Riverside Parkway. [Tr. 113.] Upon removal of other obstructions, by widening Franklin and Western Avenues which connect to Los Feliz and elimination of the grade crossing, use of Los Feliz by motor vehicles will increase. [Tr. 196.]

The number of train movements has materially increased in the last fifteen years [Tr. 71, 107; Ex. 4.] and *the length of freight trains has been drastically increased* during the lives of some of the Railroad's personnel. [Tr. 256.] All passenger trains are either just starting or slowing almost to a halt while passing the Los Feliz grade crossing. [Tr. 67.] Freight trains also operate at reduced speed because they are either slowing up as they approach the Los Angeles yards or they are picking up speed as a result of leaving the yards. [Tr. 67.] With the present volume of traffic, backlash (Backlash is the term used to describe the backing up of traffic from one intersection where it is stopped to block another intersection [Tr. 179.]) occurs

during peak hours as a result of train movements. The backlash occurs both at San Fernando Road when the train is crossing and upon the railroad tracks when eastbound traffic, released after a train movement, is stopped at the intersection of San Fernando Road. [Tr. 188, 189, 190, 191.] In the future when traffic volumes increase on Los Feliz, such backlash will become a common occurrence. [Tr. 197.]"

Unlike the grade separation involved in the *Nashville* case, the Los Feliz grade separation is located on a traffic artery in the midst of a metropolitan area populated by several million people. The grade separation is needed in order to provide for local transportation needs, and after construction it would be used by very few vehicles in competition with the railroad while it would be used by many vehicles bringing business to the railroad. Upon construction of the grade separation, the existing grade crossing would be eliminated and the hazardous conditions now existing at the grade crossing would also be eliminated. If the grade crossing is not eliminated, the hazardous conditions now occurring occasionally will occur regularly as the volume of traffic on Los Feliz increases.

The appellant has contended that there are no safety hazards at the grade crossing and that public safety is not an issue. With that contention we do not agree. As pointed out in the summary of facts set forth, *supra*, vehicles are now occasionally stopped on the grade crossing unable to move forward or backward because of traffic congestion, and the operation of the existing grade crossing gates contributes materially to that traffic congestion. As the volume of traffic flow increases on Los Feliz, this condition is expected to occur regularly. The Public Utilities Commission was aware of this situation and so indicated by an exceedingly brief reference thereto shown on pages 6 and 7, Appendix A, of appellant's statement as to jurisdiction. The backlash which occurs on San Fernando Road and which

is described in the Commission's opinion also occurs on the grade crossing when the traffic held up by the crossing gates is suddenly released and a greater volume of traffic is released than can cross the intersection of San Fernando and Los Feliz during one change of traffic signals.

The vice of appellant's reliance upon the remarks of Mr. Justice Brandeis in the *Nashville* case relative to changed conditions no longer warranting the imposition of costs for grade separations upon the railroad is that those remarks were directed to the Federal-aid highway system and the Federal legislative scheme for the furtherance of this new facility for through transportation. This is a matter wholly foreign to the case at bar. The case at bar comes squarely within the concession referred to in the *Nashville* case (p. 413) that, "the rule has long been settled that, ordinarily, the State may, under its police power, impose upon a railroad the whole cost of eliminating a grade crossing, or such part thereof, as it deems appropriate"; reference being made in the footnote to sixteen decisions.

The *Nashville* case is not a reconsideration by this Court of the problem of grade separation after a long interval of time elapsing since its prior consideration of the question. In 1931 this Court considered the matter collaterally in affirming judgments of the California Supreme Court affirming an order of the California Railroad Commission requiring the construction of a union passenger station in Los Angeles, it being said in *Atchison, Topeka & Santa Fe Railway Co.* v. *Railroad Commission* (1931), 283 U. S. 380, concerning railroads (p. 395):

> "They may be required at their own expense to construct bridges or viaducts whenever the elimination of grade crossings may reasonably be insisted upon, whether constructed before or after the building of the railroads."

The case at bar is an illustration of the true exercise of the police power justifying the exaction of uncompensated obedience by appellant and in no sense involves an improvement for the special benefit of any particular segment of the public of the nature involved in the *Nashville* case. This being so, appellant's persistent claim of arbitrary apportionment of costs not in consonance with benefits finds no support in any decision of this Court, and, in fact, raises no question that is not firmly foreclosed by the prior decisions of this Court.

Conclusion

Upon the foregoing, the City of Glendale and the City of Los Angeles respectfully move that the appeal be dismissed or that the judgment and decree of the Supreme Court of the State of California be affirmed.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1952~~ 1953

No. ~~739~~ 43

SOUTHERN PACIFIC COMPANY, a corporation,
Appellant

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and R. E. MITTELSTAEDT, JUSTUS F. CRAEMER, HAROLD P. HULS, KENNETH POTTER and PETER E. MITCHELL, as members of and constituting said Commission

APPEAL FROM THE SUPREME COURT OF CALIFORNIA

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No.

SOUTHERN PACIFIC COMPANY, a corporation,
Appellant

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and R. E. MITTELSTAEDT, JUSTUS F. CRAEMER, HAROLD P. HULS, KENNETH POTTER and PETER E. MITCHELL, as members of and constituting said Commission

---

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM

The Public Utilities Commission of the State of California, et al., respondents and appellees (hereinafter referred to as Commission), for its statement in opposition to statement as to jurisdiction herein of Southern Pacific Company, petitioner and appellant (hereinafter referred to as Southern Pacific), and in support of said Commission's motion to dismiss or affirm, respectfully shows the following:

I. Statement of the Facts

Southern Pacific, an intrastate and interstate common carrier of freight and passengers by railroad and/or motor vehicles between points in California, including the Cities of Glendale and Los Angeles, crosses certain streets and highways of said State, including the crossing at grade of Los Feliz Road (Boulevard) in said cities.

The Commission is the duly constituted and acting authority of the State of California having regulatory jurisdiction over all public utilities, including railroads and other transportation companies, with the exclusive power and duty to determine and prescribe grade crossing separations and, within its discretion and judgment, to apportion, divide, or allocate the expenses or costs therefor. (Sections 17, 1⁄ 23a of Article XII of the Constitution of California; the Public Utilities Act, Statutes 1915, Chapter 91, as amended; and the Public Utilities Code, Statutes 1951, Chapter 764, as amended.)

This matter concerns an existing main line railroad-highway grade crossing at the intersection of the tracks of the Southern Pacific Company and Los Feliz Road in Glendale and Los Feliz Boulevard in Los Angeles. The tracks, consisting of two standard gauge main tracks, one standard gauge passing track and two standard gauge yard tracks, run in a northwesterly-southeasterly direction, while Los Feliz, designated as a road in Glendale and a boulevard in Los Angeles, runs in a northeasterly-southwesterly direction. The boundary line between the two cities parallels the tracks in the area of the intersection. Four of the above-mentioned tracks are in Glendale, and one, a spur track, is in Los Angeles. The grade crossing is designated as Crossing No. B-476.8, and the legal description of that portion in Glendale is as follows:

That portion of the right-of-way (100 feet wide) of the Southern Pacific described in deeds recorded in Book 14094, page 214, and in Book 17837, page 49, Official Records in the office of the Recorder of Los Angeles County, California.

The legal description of that portion of the grade crossing in Los Angeles is as follows:

A strip of land having a uniform width of 30 feet, its northeasterly line being coincident and identical with the southwesterly line of the Southern Pacific main line right-of-way (100 feet wide), said strip of land extending from the southeasterly line of Los Feliz (100 feet wide) to the northwesterly line of said Los Feliz.

The authority of this Commission to make grade crossing separations and apportion or allocate the costs therefore as herein involved stems primarily from Section 1202 of the Public Utilities Code, *supra*, from which we quote:

"1202. The Commission has the exclusive power:

"(a) To determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use, and protection of each crossing of one railroad by another railroad or street railroad, and of a street railroad by a railroad, and of each crossing of a public or publicly used road or highway by a railroad or street railroad, and of a street by a railroad or vice versa, subject to the provisions of Sections 1121 to 1127, inclusive, of the Streets and Highways Code so far as applicable.

"(b) To alter, relocate, or abolish by physical closing any such crossing heretofore or hereafter established.

"(c) To require, where in its judgment it would be practicable, a separation of grades at any such crossing heretofore or hereafter established and to prescribe the terms upon which such separation shall be made and the proportions in which the expense of the con-

struction, alteration, relocation, or abolition of such crossings or the separation of such grades shall be divided between the railroad or street railroad corporations affected or between such corporations and the State, county, city, or other political subdivisions affected." Former Sec. 43(b), 1st sent.)

The Cities of Glendale and Los Angeles, California, alongside and on whose boundary lines the instant Los Feliz Road (Boulevard) grade crossing is situated, are parties of real interest herein.

That on May 7, 1951, the said City of Glendale filed with said Commission Application No. 32385 requesting an order authorizing the construction of a grade separation at the above-described crossing, including a designation of the portions of the work and construction to be done by Glendale, Los Angeles and the Southern Pacific, respectively, as well as an allocation of the costs thereof.

Subsequent thereto (September 25, 1951) the Commission in P. U. C. Case No. 5327 issued an Order of Investigation to determine whether or not, "in the interest of public safety, convenience and necessity," the grade separation should be constructed and also to determine "the proportions in which the expense of constructing and maintaining such a separation shall be divided among the Southern Pacific Company, the City of Los Angeles, the City of Glendale, the County of Los Angeles, the Department of Public Works, Division of Highways, of the State of California, or other political subdivisions affected * * * *".

This Los Feliz grade crossing had long since attained prominence through its "top priority" position with the Los Angeles County Grade Crossing Committee and the fact that the California Legislature, at its 1949 Session, by House Resolution No. 24, directed the Commission to initiate proceedings with a view to such separation. This was

followed by the Commission's report to that Body on March 6, 1950, setting forth the results of an engineering study showing the estimated cost, economic justification, and problems of its financing.

Additionally, at its 1951 Session, said California Legislature, by Assembly Concurrent Resolution No. 88, directed the Commission to hold hearings on Los Feliz crossing separation, and this Commission's investigation (P. U. C. Case No. 5327, *supra*) was instituted accordingly.

Public hearings were held in Los Angeles on October 3, November 1 and 29, 1951, evidence was adduced and all matters submitted on briefs by the parties, in the course of which three alternative plans (including overpass versus underpass) for the proposed grade separation were duly considered, the Commission having finally adopted underpass construction with a gravity storm drain as the cheapest of the three proposed plans as detailed in the record.

Suffice it to state that upon a full consideration of the entire record, the Commission found said Los Feliz grade crossing separation to be entirely practical and in the interest of public safety, convenience and necessity and, pursuant to powers conferred and duties prescribed, apportioned and divided the cost allocations among the parties as follows:

> "1. Of the total cost of the proposed structure, as set out in the foregoing opinion which is estimated to be $1,493,200, fifty per cent (50%) shall be borne by the Southern Pacific Company, twenty-five per cent (25%) by the County of Los Angeles, twelve and one-half per cent (12½%) by the City of Glendale, and twelve and one-half per cent (12½%) by the City of Los Angeles."

In so doing, the Commission in its instant Decisions Nos. 47420 and 47597, which Southern Pacific here assails, wholly

affirmed its previous holdings in such matters wherein it had clearly set forth the law when it stated:

> "There is no statutory requirement that this Commission follow any particular theory of allocation of costs. Under the theory advanced by the City of Los Angeles that the railroad should pay the additional costs of construction resulting from the presence of the tracks, the railroad's share would amount to about 86 per cent of the total costs. Under the theory advanced by the railroad that it should pay only according to the benefits it receives, and considering its contention that it receives no benefits, its contribution would be nothing.
>
> "The authority of this Commission to allocate costs, as designated in Section 1202 of the Public Utilities Code, *supra*, is an exercise of the police power on the part of the State of California through the medium of its agency, the Public Utilities Commission. We hold that the law is well established that under the exercise of the police power a state may regulate the crossings of railroads with its highways, and may require grade separations to be erected and maintained, apportioning the costs in the exercise of its sound discretion." (*Erie Railroad Company* v. *Board of Public Utility Commissioners*, 1920, 254 U. S. 394; 65 L. ed. 322; *Chicago, Milwaukee and Saint Paul Railway Company* v. *Minneapolis*, 1914, 232 U.S. 430; 58 L. ed. 671; *Missouri Pacific Railway Company* v. *Omaha*, 1914, 235 U. S. 121; 59 L. ed. 157; *Lehigh Valley Railroad Company* v. *Board of Public Utility Commissioners*, 1928, 278 U. S. 24; 73 L. ed. 161.) (Also, *Cincinnati, I. & W. R. Co.* v. *Connersville* (1910) 218 U. S. 336, 54 L. ed. 1060; *State ex rel. Alton R. Co.* v. *Public Service Commission (Mo.)* (1934) 70 S. W. (2d) 57, 60; *Northern Pacific R. Co.*, v. *Minnesota ex rel. Duluth* (1907) 208 U. S. 583, 52 L. ed. 630; *Penn.-Reading S. Lines* v. *Board of P. U. Com., etc.*, (1951) 81 A. (2d) 28; Affirmed 82 A. (2d) 774.)

Complete supporting details surrounding both factual and legal conclusions are embraced within pages 778 to 798, inclusive, of Decision No. 47420, Application No. 32385, Case No. 5327, as reported in 51 Cal. P. U. C. 788, and appended to petitioner-appellant's Statement as to Jurisdiction, hence not further detailed herein.

In brief, applicant contended that all costs should be borne by the railroad owing to the latter's obstruction of the highway, while the railroad [Southern Pacific] contended for the so-called "benefits" theory of payment of only such costs as would yield to it a direct monetary benefit or return.

The Commission, however, basing upon the entire record, did not subscribe to either of the foregoing contentions, but affirmed its prior holdings in these words, to-wit:

> "While the railroad [Southern Pacific] contended that costs should be assessed according to the so-called 'benefits' theory, we affirmed our holding in Decision No. 47344, dated June 24, 1952, in Application No. 29396, wherein it was held that the authority of this Commission to allocate costs stems primarily from Section 1202 of the Public Utilities Code and is an exercise of the police power on the part of the State of California through the medium of its agency, the Public Utilities Commission. Therefore, we are not bound to follow this so-called 'benefits' theory, although it is appropriate to observe that the proposed grade separation will obviously be of benefit to the railroad. * * *" (P.U.C. Decision No. 47420, pages 795-796, *supra.*)

Petitioner-appellant, Southern Pacific, concedes the feasibility, desirability, and propriety of the instant Los Feliz grade separation, which crossing has already reached its capacity. In fact, it admits the public interest and over-all benefits in which it automatically shares, but objects to

the Commission's four-way allocation of costs among the beneficiaries directly involved.

Furthermore, it concedes the elimination of the increasingly aggravated and costly pedestrian, vehicular, train, and other delays upon this major traffic artery, as the official record confirms, but asserts that the railroad cannot benefit from these results. To quote petitioner-appellant:

> "* * * Indeed to the extent that competitive traffic (including that moving in private automobiles) using Los Feliz, or other affected roadways, is enabled by this improved facility to move faster or move more cheaply, petitioner is damaged instead of benefited."

And, based upon such a premise, it dismisses instanter the entire subject of public safety, welfare, convenience and necessity involved and proceeds on a so-called "benefits" theory to whittle away its proportional allocation to a paltry minimum, which latter it has described to the Court as being "a contribution against will". Strange logic, indeed, to come from one of the most extensive and intensive railroad-highway operators throughout the entire State of California.

To the contrary, on page 49 of its Answer to Petition for a Writ of Review, this Commission specifically set forth a dozen examples of enumerated benefits which would inevitably flow directly to Southern Pacific as a result of the Los Feliz crossing separation, all of which stand uncontroverted in the record and are doubly enhanced when considering the state-wide motor vehicle operations (freight-passenger-express) of its well-known subsidiaries operating throughout California.

And, owing to petitioner-appellant's assertion of unrelated assessment to benefits or monetary savings to the railroad, the Commission staff studies set up accrual estimates covering vehicular delay, railroad operating costs,

gatemen, maintenance, accident damages paid by the railroad, the depreciation on the railroad's portion of the structure and maintenance thereof, excluding track, and reflecting net annual savings of some $63,279.00, which savings, capitalized at 3%, 4%, or 5% [1] would produce $2,109,000, $1,582,000, and $1,266,000, respectively.

II. Statement of Issues on Appeal

In brief, that Commission Decisions Nos. 47420 and 47597 of June 30 and August 19, 1952, respectively, *supra*, are unconstitutional in violation of (1) the due process and equal protection clauses of the 14th Amendment, (2) commerce clause (~~Art. I, Sec. 8, Par.~~ 3) and (3) the National Transportation Policy (54 Stats. 899).

III. No Substantial Federal Question is Presented by the Attempted Appeal

Preliminary Statement

At the expense, perhaps of too great detail, we have endeavored to make clear factual developments and procedures surrounding the "top priority" status, by which statewide attention has focused upon Los Feliz crossing in the general public's demand for relief.

Also, that the Commission, in apportioning the cost of constructing the instant grade separation as between the several parties directly involved, gave due consideration to the obligations of each, as well as to the benefits derived (51 Cal. P.U.C. 771, 781), even though by weight of judicial decision hereinbefore cited, the element of direct benefit is immaterial. The Commission commented respecting the direct benefits which obviously would accrue to Southern

---

[1] The then current cost of obtaining money on long-time basis by Southern Pacific.

Pacific, in brief, enumerating, amongst others, longer trains, use of tracks for storage, use of streets as "feeder", elimination of accident claims, new structures and improved drainage, also, improved good will.

Nashville Case Completely Distinguishable from Case at Bar

Nevertheless, Southern Pacific disclaims such benefits would exceed its own estimated annual net benefit to the railroad of $5,917, and attacks this Commission's Decisions Nos. 47420 [2] and 47597 [3] of June 30 and August 19, 1952, respectively, alleging unconstitutionality and assigning as error its allegations of (a) unrelated costs to rail benefits; (b) absence of safety factors; (c) enhancement of motor vehicle transport; and (d) that cost assessments are not responsive to the evidence. And for support in the foregoing inexplicable stand, it admittedly relies on the single unique and completely distinguishable case of *Nashville C. & St. L. R. Co.* v. *Walters*, 294 U. S. 404, the so-called *Nashville* case, which, as hereinafter shown, affords no parallel to the instant case at bar.

As the record confirms, the *Nashville* case is wholly dissimilar, both as to governing facts and the applicable law from the instant Los Feliz grade separation case, and as presently explained, the two basically and fundamentally different situations are in nowise comparable. Furthermore, as we have summarized in the course of briefing the record, it has been amply demonstrated that there is no logical or legal basis for the contention that the costs of the instant Los Feliz grade separation be borne by the parties respectively in accordance with the pecuniary benefits derived by them nor are any such benefits mathematically

[2-3] Appendices A and B, respectively, Appellant's Statement as to Jurisdiction.

calculable, even as the highly important factor of improved *good will,* but which, admittedly, is difficult of precise monetary evaluation.

By the great weight of judicial decision above cited, the element of direct benefit is absolutely immaterial. As stated by the Commission, it is one of the factors for consideration but not necessarily a controlling factor. Thus, to cite petitioner-appellant, Southern Pacific's one and only case relied upon herein, it was expressly recognized by the Honorable Court at page 964 of said *Nashville* case:

> "It is also true that state action imposing upon a railroad the cost of eliminating a dangerous grade crossing of an existing street may be valid although it appears that the improvement benefits commercial highway users who make no contribution toward its cost." (Citing cases.)

Accordingly, we have uniformly contended that the *Nashville* case is no authority for the inference or contention by petitioner-appellant that the law has now been changed so that railroads cannot be required to pay the cost of grade crossing separations.

As was stated by the Honorable Supreme Court of the United States in the *Nashville* case (79 L. ed. 964):

> " • • • No case involving like conditions has been found in any of the lower Federal courts; nor, excepting the case here under review, has any such been found among the decisions of the highest courts of any state."

The claim of unconstitutionality in that case rests wholly upon the special facts shown. Therefore, the issue as to what portion of the cost should be borne by a railroad in a grade separation such as we are concerned with in the case at bar was not even an issue in the *Nashville* case.

The railroad conceded that in such a case it would be required to pay the entire cost.

And we respectfully submit that the only point decided by the Supreme Court of the United States was that the Supreme Court of Tennessee erred when it refused to consider the special facts in that case; that all the Supreme Court of the United States did was to remand the case to the Tennessee court for consideration of those special facts; that the Supreme Court of the United States did not purport to determine that even under the special facts there involved it was unconstitutional to assess one-half of the cost against the railroad. Instead, it expressly stated that it was not making such a determination, which was in the first instance for determination of allocation of costs by the Tennessee court (p. 985).

The evidence and the findings of the trial court which the Supreme Court of Tennessee refused to consider appear at length in pages 956-961, *supra*, a brief synopsis of which shows that the construction of the new highway with the underpass was not designed to meet local transportation needs, nor upon consideration of local safety needs, but that the requirement of the underpass, and the payment of the Railway under the 1921 Tennessee Act of one-half the cost of separating the grades were results of the Federal-aid legislation. Final payment of Federal aid on this project was conditioned upon commencement of the construction of this underpass (79 L. ed. 956-961).

In other words, the underpass there involved was constructed in order to qualify for Federal funds, not to meet local traffic needs and attendant safety, convenience and necessity as in the case at bar.

As a matter of fact, and as the record shows, the two separate highways in the *Nashville* case and the two widely separated crossings there involved (being a quarter of a

or more apart) are separately operated today just as tofore with neither in anywise supplanting the other, merely a new transcontinental super-highway route blished.

is makes it abundantly clear that the Supreme Court e United States did not intend that the *Nashville* case ld be considered as reversing the long line of prior , *supra*, setting forth the railroads' continuing obliga- and responsibility in connection with grade separations.

roads' Continuing Obligation to Help Provide Safe d Adequate Crossings Over Their Tracks, at Grade Separated Grade

titioner-appellant, Southern Pacific, has stated that Commission has adopted the so-called "benefit theory" proper basis for the apportionment of costs, but the ions cited by it do not support such contention.

e *Goshen Junction case*, 38 C. R. C. 380 (1933) involved te highway to be paid in part with Federal-aid funds ighway construction, in the course of which the Com- ion took cognizance of the then existing depression expressly gave consideration to "the economic situa- particularly at this time when revenues from prac- y all sources are materially below what they have been e immediate past". Said facts are borne out by the mission's Decision No. 25069 of August 15, *1932*, for ple, as reported in 37 C. R. C. 784, 786-787, and in h it specifically repudiated the so-called "benefits y" of apportioning grade separation costs in these s:

"The matter of direct financial benefits is not the ole test in the determination of the respective portions which the railroad and public should contribute toward he cost of such improvement. In apportioning the

cost of constructing these separations between applicant and the railroad company, due consideration should be given to the obligations of each party, as well as to the benefits derived. *It should be recognized that the railroad has a continual obligation to participate in the matter of constructing and maintaining reasonable and adequate crossings over its tracks, both at grade and at separated grades. This obligation is inherent, notwithstanding the fact that the traffic on the railroad may increase or decrease.*" (Emphasis added.)

Other citations of the kind by petitioner appear so widely different, factually speaking, as to neither require nor admit of detailed analysis herein.

If the foregoing be what petitioner-appellant has alluded to in its Statement as to Jurisdiction as new versus old Commission policies, it should here be stated that the more than 40 years of this Commission's administration of grade crossings in California show a range of variation in cost allocations among the several carriers and other parties involved of from zero % to 100% according to the governing circumstances and conditions.

And the fact must not be overlooked how petitioner-appellant has studiously avoided stating to the Court that not only has Los Feliz crossing already reached its capacity with over 27,000 motor vehicles using said crossing daily (plus multi-thousands of riders therein), but Exhibit No. 2, Part IV, of the official record shows by actual test period counts that an average of 620 pedestrians also daily use said crossing; hence the conclusions and findings in the interest of "public safety, convenience and necessity," as well as for the most practicable construction, and further, that the proposed construction neither embraces a state highway nor Federal-aid funds but is dependent upon local funds. Throughout this entire "profits" theory, of course, as interpreted by petitioner-appellant, threads the assump-

tion that its railroad has the right-of-way over Los Feliz grade crossing, and that vehicular and pedestrian traffic must at all times yield to said railroad.

Nor should it be forgotten that the leading cases prior to, during, and since the so-called *Nashville* case support the controlling principles of law whereby a railroad company takes its charter subject to the power of the State to provide for the safety of the public, and tracks of the railroad are laid subject to the condition necessarily implied, that their use could be so regulated by competent authority as to ensure said public safety, welfare, convenience and necessity.

Also, that such railroad, when thus accepting privileges and franchises granted in its charter, must be deemed to have taken into account expenses which might thereafter be incurred by reason of an order of the Public Utilities Commission compelling the necessary installations for its safe operation at public highway crossings. (*Pennsylvania-Reading Seashore Lines* v. *Board of Public Utility Commissioners, Department of Public Utilities, et al.* (1951), 81 A. (2d) 28, 33; affirmed in 82 A. 2d 774.)

In petitioner-appellant's Statement as to Jurisdiction, Southern Pacific, for purposes of support, refers to the *Santa Fe* case (Washington Boulevard) asserting "the basic contentions advanced by the railroad in these two cases have been and are essentially the same," • • • "virtually identical". This is diametrically opposite to petitioner-appellant's reply to the answering briefs of this Commission and the Cities of Los Angeles and Glendale wherein Southern Pacific, following the California Supreme Court's action on the *Santa Fe* case (Washington Boulevard, *supra*), and we quote: "That case [Santa Fe-Washington Boulevard] differed from the case at bar [Southern Pacific-Los Feliz] in at least two important respects."

The Commission Here Considered Both the Benefits and the Obligations of the Parties Involved at Los Feliz

This latter action is strikingly corroborated in the instant Los Feliz decision wherein petitioner-appellant, Southern Pacific, reduced the engineering storm drainage estimate from $249,100 to a sump and pump which it estimated at $28,500, and which latter cheapest minimum was adopted for said drainage, the Commission finding that, "while the more elaborate gravity storm drain is desirable, yet it would provide drainage for more than the structure area [and], accordingly, the entire cost of such a storm drain should not be included in any costs which are apportioned to the railroad," hence deducted $220,600, or the difference between the said two preceding sums, and used the petitioner-appellant's own calculations in the four-way cost allocations covering this very important structure.

The Decisions of the Commission Do Not Constitute an Unlawful or Other Burden on Interstate Commerce

Petitioner-appellant asserts that the Commission's order would result in undue financial burden on interstate commerce. We submit that the Los Feliz crossing, a purely local matter, is too remote and unrelated to the Commerce Clause or the National Transportation Policy to call for reply.

The mere fact that Southern Pacific is engaged in interstate as well as intrastate commerce has no significance so far as the validity of the instant order of the Commission is concerned.

Petitioner-appellant does not categorically assert that a State has no authority to burden or regulate interstate commerce but it might be inferred that such contention is being made by petitioner from the propositions advanced by it. We desire to call to the Honorable Court's attention the rule laid down by the Supreme Court of the United

States that a State may, lawfully, *burden* interstate commerce and regulate it so long as State authority does not discriminate against such commerce. (*South Carolina State H. Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 189, 82 L. ed. 734, 741; *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U. S. 329, 333, 95 L. ed. 993, 998; *Railway Express Agency* v. *New York*, 336 U. S. 106, 111, 93 L. ed. 533, 539; *Kelly* v. *Washington*, 302 U. S. 1, 9-15, 82 L. ed. 3, 10-13; *Cities Service Gas Co.* v. *Peerless O. & G. Co.*, 340 U. S. 179, 186, 95 L. ed. 190, 202.)

And it has long been held by the United States Supreme Court that until such time as the Congress pre-empts the entire field of regulation, both interstate and intrastate common carriers and utilities are subject to state regulation insofar as intrastate operations are concerned, even though their operations are regulated by federal authority. *Cooley* v. *Board of Port Wardens* (1851) 12 Howard (U. S.) 299, 12 L. ed. 996; *Minnesota Rate* cases (1913) 230 U. S. 352, 57 L. ed. 1511; *Eicholz* v. *Public Service Commission* (1939) 306 U. S. 268, 83 L. ed. 641; *Smith* v. *Illinois Bell Telephone Co.* (1930) 282 U. S. 133, 75 L. ed. 255; *Lindheimer* v. *Illinois Bell Telephone Co.* (1934) 292 U. S. 151, 78 L. ed. 1182.

And it is common knowledge respecting presently enhanced financial condition of Southern Pacific by which its net operating results have attained all-time peaks. Also, that the record herein establishes no claim by it of any impairment of its ability to render adequate transportation services—both intrastate and interstate—nor is there any showing whatsoever that the instant order impinges on the National Transportation Policy of the Congress. (*South Carolina State H. Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 189, 82 L. ed. 734, 741; *Panhandle Eastern Pipe Line Co.* v. *Michigan Pub. Serv. Comm.*, 341 U. S. 329, 333, 95 L. ed.

993, 998. *Alabama P. S. Com.* v. *Southern R. Co.*, 341 U. S. 341, 95 L. ed. 1002; *North Carolina* v. *United States*, 325 U. S. 507, 511, 89 L. ed. 1760, 1765.)

Petitioner-appellant's departures from the official record herein (as also occurred in its earlier briefing and to which departures we directed attention of the Court) have ranged far afield in the use of outside railroad propaganda in confusion of the record and in attempted support of its advocated "benefits" theory. Similar action has characterized its treatment of purported state legislative trends and in reply to which we quote the Cities of Los Angeles and Glendale—parties in real interest herein—to wit:

> "Petitioner [Southern Pacific] has argued that the trend nationally is toward allocating costs of grade separation on the basis of benefits. It would probably be more accurate to say that in recent years the railroads have successfully secured passage of legislation by more and more states relieving them of their legal obligation to provide adequate grade crossings." (Los Angeles-Glendale Joint Brief, p. 40.)

Similarly, petitioner-appellant's Statement as to Jurisdiction has devoted much space to the historical of antiquated versus modern transport which, we believe, lacks pertinency herein. If there be any point to all such, it is Southern Pacific's oblivion respecting the antiquity of its own "iron horse" whose movements at the intersection not only blockade Los Feliz thoroughfare, but for the railroad's perpetuation of which it manually raises and lowers the gates 70 or more times daily.

All told, it seems perfectly clear that the motivating purpose is and the obvious result of Southern Pacific's attack would be the ultimate defeat, through prolonged and futile negotiations, of any and all future grade separation relief owing to the highly controversial character of the impracticable benefits theory which it here seeks to obtain.

And just as we have said before and as we here reiterate, that mindful of the history of Commission grade crossing procedures, it is doubly apparent that the petitioner-appellant's rail benefits theory here urged would be a perversion of grade crossing regulation as it exists in California, and would virtually nullify the present constitutional and statutory mandates of this State.

IV. Conclusion and Motion to Dismiss or Affirm

In conclusion, we respectfully submit that whether the Commission's prescribed duty of specifically allocating Los Feliz grade separation costs among the parties here involved (the only point in controversy) be strictly viewed as a legislative or judicial function (of which this Commission under powers conferred exercises both), the fact remains that the questions presented in this attempted appeal have long ago been so definitely settled and so continuously affirmed by the Courts since, that no substantial questions are presented by this appeal entitling Southern Pacific to invoke the jurisdiction of the Supreme Court of the United States.

WHEREFORE, appellee and respondent respectfully moves that the within appeal be dismissed, or that the judgment and decree of the Supreme Court of the State of California denying petition for a Writ of Review and the decisions and orders of the Commission be affirmed.

Dated, San Francisco, California, April 10th, 1953.

Respectfully submitted,

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Appellees.

Appeal From the Supreme Court of California.

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IN THE

Supreme Court of the United States

October Term, 1953

No. 43

SOUTHERN PACIFIC COMPANY, a corporation,

Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and R. E. MITTELSTAEDT, JUSTUS F. CRAEMER, HAROLD P. HULS, KENNETH POTTER and PETER E. MITCHELL, as members of and constituting said Commission,

Appellees.

Appeal From the Supreme Court of California.

Brief of City of Los Angeles and City of Glendale, Real Parties in Interest.

Foreword.

The City of Los Angeles and City of Glendale, real parties in interest in the above-entitled cause, file this separate brief in reply to that portion of the joint brief for appellants filed in this case and in *The Atchison, Topeka and Santa Fe Railway Company v. Public Utilities Com-*

mission of the State of California and City of Los Angeles, No. 22, for the following reasons:

1. The factual situation in the two cases is entirely different. This case involves the elimination of an existing grade crossing whereas the *Santa Fe Railway Company Case No. 22* involves the enlargement of an existing inadequate grade separation.

2. The City of Glendale was the applicant who filed the petition for the order of the California Public Utilities Commission which gives rise to this appeal, and the City of Glendale and City of Los Angeles are real parties in interest in this case since each city is required to pay 12½% of the cost of the grade separation under the order of the Public Utilities Commission which is under question in this appeal.

Statement of the Case.

Due to the fact that the statement presented by the appellant, hereinafter referred to as Railroad, did not give a fair picture of the facts in this case, we point out the following information which is material to the question presented:

Throughout the proceedings below, the Railroad contended that public safety was not involved in the Los Feliz grade crossing, and that the Commission could not therefore allocate to it a share of the cost of constructing the grade separation which exceeded the benefits to the Railroad. The record of the evidence presented to the Public Utilities Commission of California is not before this Court, and the Railroad has referred only to evidence before the Commission which is most favorable to the Railroad's position. However, substantial evidence of a

public safety hazard at the grade crossing, and caused by the grade crossing, was presented to the Commission as well as evidence of an unreasonable obstruction of the crossing by the Railroad. [R. App. 89, 167-169]* The Commission found at the conclusion of the hearings that public safety as well as public convenience and necessity required the construction of the grade separation. [R. App. 32.]

In the petition for writ of review to the Supreme Court of California and briefs filed subsequent thereto, the Railroad has urged only the facts presented before the Commission most favorable to it. It has ignored, or contended that facts adverse to its position do not exist, or has incorrectly stated the facts. It would be impossible, without the record before the Commission, to clarify the factual situation which the Railroad has so ably confused.

The Railroad has made no contention that the construction of a grade separation is not needed. The question presented to the California Supreme Court related solely to the allocation of costs. That the issue was so limited in the court below by the Railroad was clearly and succinctly stated in its Memorandum of Points and Authorities in Support of Petition for Writ of Review to the Supreme Court of California, wherein Railroad stated [R. 14]:

> "It is important at the outset to note that petitioner did not, at any stage of the proceedings, and does

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*In the printed record, the appendix to the Petition for Writ of Review in the state court and all subsequent parts of the record were separately paged and numbered; references to pages in that appendix and subsequent parts of the record are therefore shown as "R. App. . . ." Emphasis supplied throughout this brief unless otherwise indicated.

not now oppose the construction of a grade separation at Los Feliz. On the contrary, petitioner has favored and supported that proposal."

Again, in the same memorandum of points and authorities Railroad said [R. 15]:

"Thus this petition is directed principally to the Commission's action in allocating to petitioner, as its contribution, an amount substantially exceeding and indeed having no relation to the actual benefits accruing to the petitioner, and to the Commission's failure and refusal to limit such allocation to the amount shown to represent the fair value of such benefits."

Questions Presented.

It appears that the questions presented are as follows:

1. Is an order of a public utilities commission allocating costs for construction of a grade separation structure made after notice and hearing subject to attack either on appeal or by certiorari in the absence of the record made before the commission and upon which it acted?

2. If a railroad is forced to pay a substantial part of the cost of constructing a grade separation structure in order to eliminate a safety hazard and to permit the free and presently necessary use of a street for purposes of travel, must there appear to be a corresponding benefit to the railroad in its operations substantially commensurate with the amount the railroad is forced to pay in order to avoid

(a) Taking the railroad's property for public use without just compensation in violation of the due process clause of the Fourteenth Amendment;

(b) Denying the railroad the equal protection of the law in violation of the Fourteenth Amendment;

(c) Imposing undue and unreasonable burdens upon interstate commerce in violation of the commerce clause contained in paragraph 3, Section 8, Article I of the Constitution of the United States or any paramount Federal statute?

Summary of Argument.

1. Since in a case of this nature the attack must be upon the order of the California Public Utilities Commission, the assignments of error on the part of the California Supreme Court in affirming the order do not present questions which may be decided on appeal from the judgment of that court, and the appeal should be dismissed. (*Live Oak Water Users Assoc. v. Railroad Commission* (1926), 269 U. S. 354, 357.) The order of the California Public Utilities Commission cannot be reviewed either on appeal or on certiorari because even if the order in its finality be considered as legislative-administrative in character, yet under the California constitutional provisions empowering the Commission to act, the ordained procedure by which this result is to be achieved is strictly judicial (*Pacific Tel. etc. Co. v. Eshleman* (1913), 166 Cal. 640, 650, 137 Pac. 1119, 1122), and the record made before the Commission upon which

the order involved in this case is based is not before this Court. If the Railroad is relying upon the face of the Public Utilities Commission order as showing impairment of the Railroad's constitutional rights, the order must be affirmed because there is nothing on the face of the order to furnish sufficient ground for determining that the allocation of costs is unreasonable and therefore void. The order shows on its face that the construction of the grade separation was required by the public safety, convenience and necessity, and such a finding was an adequate basis for assessing as much as the full cost of the grade separation on the Railroad. Furthermore, the validity of the order depends upon the facts of this particular case, and the record of the facts upon which the order involved in this case is based is not before this Court.

2. Even if the order of the Commission were considered properly before this Court on appeal, and the record before the Court were considered adequate, the order should be affirmed. If the order were considered a legislative act of the State of California, it would come before this Court on appeal with a presumption of validity. (See *Alaska Packers Assoc. v. Industrial Accident Commission* (1934), 294 U. S. 532, 543; *Borden Farm Products v. Baldwin* (1934), 293 U. S. 194, 209.) The findings of fact of the Commission that the public safety, convenience and necessity require the construction of the grade separation, would also be presumed to be correct. (See *Radice v. New York* (1923), 264 U. S. 292, 294-

295.) If the order as a legislative act would be considered valid only in the event that certain circumstances exist, it would be presumed that all such circumstances do exist. (See *Borden Farm Products v. Baldwin* (1934), 293 U. S. 194, 209.) If the question of what the facts establish be a fairly debatable one, this Court has held, in reviewing legislation, that it would not be permissible for the Court to set up its opinion in respect of the facts against the opinion of the lawmakers. (See *Radice v. New York* (1923), 264 U. S. 292, 294.)

In this particular case, the Public Utilities Commission of California, after hearing extensive evidence including substantial evidence that the existing grade crossing is hazardous and unreasonably interferes with the use of a public street by the public, found that the public safety, convenience and necessity require the construction of a grade separation. [R. App. 31-32.] In addition to the evidence received, the Commission was undoubtedly aware of the conditions at the grade crossing which had been before it for consideration on previous occasions. (Joint Br. for Appellants, 10.) The direct and indirect benefits to the Railroad arising from the construction of a grade separation structure were fully presented to the Commission and considered by it in reaching its decision. [R. App. 32-33.] The continuing obligation of the Railroad to assist financially in the construction of the grade separation was also considered. [R. App. 32.] After a consideration of all these factors, the Railroad was ordered to pay only 50% of the total cost. [R. App. 34.]

Under the recited circumstances, the order clearly constitutes a reasonable exercise of the police power.

The Railroad concedes that the decisions of this Court prior to 1935 held that railroad corporations could be required at their own expense not only to abolish existing grade crossings but also to build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their tracks, or to carry their tracks over such highways. However, the Railroad contends that the decision of this Court in the case of *Nashville C. & St. L. R. Co. v. Walter* (1935), 294 U. S. 405, reversed the previous decisions of this Court with respect to the allocation of costs of grade separations. But the *Nashville* case did nothing more than determine that it was improper for the Supreme Court of Tennessee to refuse to consider certain evidence in determining whether or not a statute requiring a 50% allocation of grade separation costs to a railroad was reasonable as applied to the particular grade separation involved in that proceeding. This Court did not decide that if, after considering such evidence the Supreme Court of Tennessee had sustained a 50% allocation as being reasonable, it would substitute its judgment for that of the Supreme Court of Tennessee.

Cases decided by several of the highest state courts since the *Nashville* case do not interpret the *Nashville* case as requiring the allocation of costs on the basis of benefits where the public safety, convenience and necessity require the construction of a grade separation, and allo-

cations have been affirmed which were not based solely upon benefits to a railroad. See *State of Mo. ex rel. Wabash R. Co. v. Public Service Commission* (1936), 340 Mo. 225, 100 S. W. 2d 522, 109 A. L. R. 754; *Lehigh & C. E. R. Co. v. Public Service Commission* (1937), 126 Pa. S. 568, 191 Atl. 380; *Chicago Junction Ry. Co. et al. v. Illinois Commerce Commission* (1952), 412 Ill. 579, 107 N. E. 2d 758.

The Railroad has contended that the Public Utilities Commission of California has followed the so-called benefit principle of allocating grade separation costs for 16 years. As applied to grade separations required by the public safety, convenience and necessity, their contention is unfounded. The Commission has considered benefits to the railroads when allocating costs for separations which in the opinion of the Commission it could not find were required by the public safety, convenience and necessity, but the Commission has never felt itself bound to allocate costs solely upon the basis of benefits in those cases where it could find that the public safety, convenience and necessity required the construction of a grade separation. The practice of the Commission comports with a reasonable exercise of the police power.

3. The order of the Public Utilities Commission is not subject to attack upon the ground that it offends against the commerce clause as it makes no discrimination against interstate commerce, will not impede its movement in regular course and will affect it only incidentally.

ARGUMENT.

A considerable portion of the argument in the Joint Brief for Appellants has no particular application to the facts relating to the construction of a grade separation at the Los Feliz crossing. Accordingly, those portions of appellants' argument are passed without comment in this brief. However, the absence of reply thereto is not to be taken as acquiescence therein or agreement therewith on the part of these interested parties.

Point I.

Upon the Record Presented in This Case, This Court May Not Review the Decision and Order of the California Public Utilities Commission Either on Appeal or Certiorari.

The jurisdictional problem presented in both the *Atchison, Topeka and Santa Fe Railway Company Case No. 22* and this case, is fully covered in the brief of appellee, City of Los Angeles, filed in the *Santa Fe* case. In order not to be repetitious, argument on that problem has been omitted from this brief, but the arguments contained therein on the jurisdictional problem are adopted and urged as though set forth in full in this brief.

Point II.

Even if the Order of the Commission Be Considered Properly Before This Court on Appeal, and the Record Be Considered Adequate, the Order Must Be Affirmed.

A. The Presumption of Validity.

If this Court is to consider this case upon the merits on the theory that the order of the Commission is a statute of the State, the basic principle which underlies the entire field of legal concepts pertaining to the validity of legislation is that by enactment of legislation, a constitutional measure is presumed to be created. In every case where a question is raised as to the constitutionality of an act, the court employs this doctrine in scrutinizing the terms of the law. (*Alaska Packers Assoc. v. Industrial Accident Commission* (1934), 294 U. S. 532, 543; *Borden Farm Products v. Baldwin* (1934), 293 U. S. 194, 209.) If an act of the legislature would be valid only in the event certain circumstances exist, it will be presumed that all such circumstances do exist. Since the determination of questions of fact on which the constitutionality of statutes may depend is primarily for the legislative body, the general rule is that courts will acquiesce in the legislative decision unless it is clearly erroneous, arbitrary, or wholly unfounded. (*Radice v. New York* (1923), 264 U. S. 292, 294-295; *Borden Farm Products v. Baldwin, supra.*)

Whenever the determination by the legislature is in reference to open or debatable questions concerning which

there is a reasonable ground for difference of opinion, and there is probably basis for sustaining the conclusion reached, its findings are not subject to judicial review. In *Radice v. New York, supra,* Mr. Justice Sutherland, speaking for this Court, said (p. 294):

> "Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker."

See also *Gant v. Oklahoma City* (1932), 289 U. S. 98.

In the case of *Laurel Hill Cemetery v. San Francisco* (1910), 216 U. S. 358, this Court reviewed an ordinance of the City of San Francisco forbidding burial of the dead within the city and county limits. Mr. Justice Holmes, speaking for the Court, said (p. 365):

> "If every member of this bench clearly agreed that burying grounds were centers of safety, and thought the Board of Supervisors and the Supreme Court of California wholly wrong, it would not dispose of the case. There are other things to be considered. Opinion still may be divided, and if, on the hypothesis that the danger is real, the ordinance would be valid, we should not overthrow it merely because of our adherence to the other belief. Similar arguments were pressed upon this court with regard to vaccination, but they did not prevail. On the contrary, evidence that vaccination was deleterious was held properly to have been excluded (citing cases)."

The order of the California Public Utilities Commission which is challenged in this proceeding contains the following finding:

> ". . . we hereby find it to be in the interest of public *safety*, convenience and necessity, . . . to require the construction of a grade separation . . ." [R. App. 32.]

Under the foregoing rules of construction, the order of the Public Utilities Commission is presumed to be valid and the findings of the Commission are presumed to be correct. The presumptions continue in effect until overcome by evidence to the contrary. In this case the findings of fact were supported by substantial evidence considered by the Commission in reaching its decision, but the record needed to review the findings is not before this Court.

B. The Reasonableness of the Order.

Such record as is before this Court discloses that the challenged order of the California Public Utilities Commission was based on a consideration of:

1. Evidence that the public safety, convenience and necessity required the grade separation.

2. The direct and indirect benefits to the Railroad resulting from the construction of a grade separation.

3. The legal obligation of the Railroad to contribute toward the cost of construction of a grade separation.

1. EVIDENCE THAT THE PUBLIC SAFETY, CONVENIENCE AND NECESSITY REQUIRED THE GRADE SEPARATION.

Although the record before the Commission is not before this Court, much of the evidence before the Commission is referred to in the briefs which are a part of the printed record on appeal before this Court.

The existing grade crossing has been the scene of many accidents. [R. App. 89.] Fortunately, the accidents to date have not been particularly serious. This is due in part to the fact that crossing gates are maintained day and night and all vehicular and pedestrian traffic is stopped at the approach of trains. [R. App. 201.] However, this method of protecting the grade crossing is creating other hazardous conditions because of the great volume of local traffic now necessarily using Los Feliz. The stopping of this traffic for the length of time necessary for a long freight train to clear the grade crossing results in "backlashing"; that is, delayed traffic collects and backs over San Fernando Road and other streets. [R. App. 202.] For example, vehicles caught in the "backlash" become completely blocked in the intersection of San Fernando Road and Los Feliz, an intersection approximately 800 feet east of the grade crossing. Unable to go either forward or backward, these vehicles are helplessly trapped in a very hazardous situation, with heavy traffic including many large trucks approaching such trapped cars at substantial speeds from both directions on San Fernando Road. [R. App. 202.]

"Backlash" now occasionally occurs on the railroad during peak hours. [R. App. 202.] The "backlash" occurs when traffic which has been collected by the closing

of the crossing gates is released. The released traffic is in such large volume that it is unable to clear traffic-controlled intersections nearby, with the result that vehicles are stopped on the railroad tracks, unable to move forward or backward, and the gateman is unable to lower the crossing gates when this situation occurs. As traffic flow on Los Feliz increases in the future, "backlash" will become a common occurrence. [R. App. 202.] Traffic volume has increased from 16,000 vehicles per day in 1923, to 27,000 vehicles per day in 1951 [R. App. 202], and traffic volume is expected to increase further. The standing of vehicles on a grade crossing, as a result of "backlash" of vehicles unable to move forward or backward, presents an obviously hazardous situation and such a situation may be expected to become a common occurrence in the future. [R. App. 202.] The Public Utilities Commission commented briefly on the congestion at the grade crossing in its decision. [R. App. 25.]

The Railroad has gradually increased its obstruction of the Los Feliz grade crossing, and has thus increased the inconvenience to and interference with the general public who use this crossing. The number of freight movements has increased materially since 1936. [R. App. 202.] On August 7 and 8, 1936, at another grade crossing which is approximately one-half mile from the Los Feliz crossing on the same main line tracks, there were 24 or 25 movements counted per day *inclusive* of any switching operations [R. App. 202], while at the Los Feliz grade crossing on Sunday, June 17, 1951, there were 54 train movements (*exclusive* of nine switching movements); on Monday, June 18, 1951, there were 60 train movements (*exclusive* of 16 switching movements); and

on Wednesday, June 20, 1951, there were 59 train movements (*exclusive* of 13 switching movements). [R. App. 202.] It is therefore apparent that the number of freight and passenger trains has increased from not more than 24 or 25 per day in 1936 to 58 or 60 per day in 1951, an increase of approximately 140%. The Railroad contended that the two crossings were not comparable [R. App. 251-252], but the exhibits presented to the Commission show clearly that the same through trains pass both grade crossings and the figures referred to above understate rather than overstate the increase in the number of trains.

During the period of service of the Superintendent of Railroad for its Los Angeles Division, train lengths increased from 35 car trains when he was a brakeman, to present-day 90 to 100 car trains, which are quite common. [R. App. 203.] The same witness testified that during the past 25 years train lengths have increased from 75-80 car trains to 90-100 car trains [R. App. 203], or at least 20%. The increased number of train movements and the increase in the length of trains operated obviously have increased the inconvenience to, obstruction of, and interference with that portion of the public using the Los Feliz crossing.

Although the crossing has been the scene of ten crossing accidents in the ten-year period 1942 through 1951 [R. App. 89], the Commission was not obligated to consider the crossing safe merely because the accident record in the past was not serious. The words of Mr. Justice Holmes in the case of *Erie R. Co. v. Board of Public Utility Commissioners* (1920), 254 U. S. 394, are characteristically pertinent and concise (p. 412):

> "If we could see that the evidence plainly did not warrant a finding that the particular crossings were

dangerous, there might be room for the argument that the order was so unreasonable as to be void. The number of accidents shown was small, and if we went upon that alone we well might hesitate. *But the situation is one that always is dangerous.* The board must be supposed to have known the locality, and to have had an advantage similar to that of a judge who sees and hears the witnesses. The courts of the state and county have confirmed its judgment. *The tribunals were not bound to await a collision that might cost the road a sum comparable to the cost of the change.*"

The present condition of the grade crossing presents an intolerable situation, both from a safety and a delay factor. Even assuming that the operation of crossing gates, with no regard to the delay caused to vehicular and pedestrian traffic, renders the grade crossing itself relatively safe, this does not eliminate the hazard caused by the grade crossing. As has been shown, this merely transfers the main point of hazard from the grade crossing itself to other intersections and causes the grade crossing to become hazardous immediately after passage of a train due to the "backlash" condition which is created thereon. But it is the grade crossing, which causes such hazards. In the absence of the grade crossing, the traffic would flow over the city streets and over the crossing without the hazards that are now present due to the crossing. The Railroad has contended that public convenience is not a sufficient basis for allocating to it a portion of the cost of making a grade crossing safe if such allocation exceeds the benefits to the Railroad from the construction of the grade crossing. The Railroad in effect argues that the hazard of the existing grade crossing could be removed

without the necessity of constructing a grade separation by merely closing the public street and that it may close the street to the great inconvenience of the public without any obligation to help in financing the elimination of the obstruction which it has created. The Railroad at more or less frequent intervals does now close or obstruct the street, with the resulting chaotic interruption of vehicular and pedestrian traffic. The expedient of temporarily closing a public street in order to make a grade crossing safe may be resorted to only when to do so does not cause excessive public inconvenience and delay. When the public inconvenience is caused by the Railroad unreasonably blocking the street, then certainly the Railroad can be required to pay a portion of the cost of the grade separation which exceeds its benefits. If this were not the case, the Railroad could in effect close off, and deprive the public of, the public street without any obligation to aid in keeping it open for use by the public.

2. THE DIRECT AND INDIRECT BENEFITS TO THE RAILROAD RESULTING FROM CONSTRUCTION OF A GRADE SEPARATION.

The Railroad has admitted very limited direct benefits from the construction of the grade separation. Its witnesses presented evidence to indicate that it could contribute the sum of $118,340 [R. App. 30] toward the cost of the grade separation, which it would recover over the life of the project in reduced expenses; in other words, the Company could contribute the $118,340 without really being out of pocket any money. In calculating the $118,340 the Railroad officials omitted many items which could properly have been included.

There are many other benefits, direct and indirect, to the Railroad from the construction of a grade separation. The Railroad has disputed all of these, as apparently railroads have in many cases throughout the country. In attempting to administer the so-called benefits theory under the Federal Aid Highway Act, similar disputes arose between railroads and state highway departments. General Administrative Memorandum 325 of the United States Bureau of Public Roads, issued in 1948 in connection with the Federal Aid Highway Act, contains the following statement and finding [R. App. 194, 195]:

> "Experience has demonstrated that it is impossible to measure benefits satisfactorily for individual railway-highway projects."
>
> [Finding] "2. That experience under the Act has demonstrated that many of the elements of the railroads benefits are so vague and difficult of evaluation, are so intangible or speculative, and are the subject of such divergence of views on the part of railways and the State highway departments that it generally has been and is impossible for them to arrive at a mutually acceptable basis for negotiating the agreement required of them for undertaking individual railway-highway projects. This has resulted in prolonged and futile negotiations in an effort to arrive at a basis of agreement and has defeated the undertaking of many urgently needed projects."

At the hearings before the Public Utilities Commission, evidence as to the following benefits was submitted to and considered by the Commission:

> (a) The benefit from being able to operate longer trains without unreasonable obstruction of grade crossings. [R. App. 198.]

(b) The benefit from being able to use tracks for storage purposes without unreasonable obstruction of grade crossings. [R. App. 198.]

(c) The benefit from the improvement of a street which is used as a feeder for the Railroad. [R. App. 199.] Thousands of the Railroad's patrons reach the Company's passenger station over the Los Feliz grade crossing, and upon construction of the grade separation those patrons will be able to reach the station without the inconvenience and delay now occasioned by delay at the grade crossing. [R. App. 199.]

(d) The benefit from the elimination of grade crossing accidents. While the accident experience at the Los Feliz crossing in recent years indicates an average annual cost to the Railroad of only $475 per year, one serious accident could involve a substantial amount of damage to Railroad property. [R. App. 200.] It is obvious that one accident might involve the Railroad in large claims for injuries to persons or property. The estimate of future damage claims based upon experience of the past ten years is inadequate and purely speculative, considering the increase in hazards which will develop as traffic volume on Los Feliz increases. As such traffic increases, "backlash", with vehicles stalled on the railroad tracks unable to move forward or backward, will become a common occurrence [R. App. 169.] From a safety standpoint a grade separation is of great benefit to the Railroad, and the benefit will grow greater every year.

(e) The benefit from improved good will. Many members of the public are antogonized against the Railroad by the unreasonable delay which now occurs at the grade crossing. [R. App. 200.]

(f) The benefit from improved drainage at the grade crossing. With the construction of the grade separation, water which now flows in the track area will be collected and disposed of without flowing over the tracks. [R. App. 201.]

3. THE LEGAL OBLIGATION OF THE RAILROAD TO CONTRIBUTE TOWARD THE COST OF CONSTRUCTION OF A GRADE SEPARATION.

The Railroad has a legal obligation to participate in constructing and maintaining reasonable and adequate crossings over its tracks, both at grade and at separated grades. This obligation has been thoroughly set forth in many cases in other states, and in California by the Public Utilities Commission's Decision No. 25069 of August 15, 1932, reported in 37 C. R. C. 784, 786, 787:

> "The matter of direct financial benefits is not the sole test in the determination of the respective portions which the railroad and public should contribute toward the cost of such improvement. In apportioning the cost of constructing the separations between applicant and railroad company, due consideration should be given to the obligations of each party, as well as to the benefits derived. It should be recognized that the railroad has a continual obligation to participate in the matter of constructing and maintaining reasonable and adequate crossings over its tracks, both at grade and at separated grades. This obligation is inherent, notwithstanding the fact that the traffic on the railroad may increase or decrease."

In the decision involved in the *Santa Fe Railway Company Case No. 22*, the Commission affirmed its previous decisions that the Railroads have a continuing obligation to participate in the cost of constructing grade separations. (51 Cal. P. U. C. Reports 771, 782.) In the order involved in this appeal, the Commission affirmed its holding in the order involved in the *Santa Fe Railway Company Case No. 22.* [R. App. 32.]

With the California Public Utilities Commission having considered all of the foregoing facts and having allocated to the Railroad an assessment of only 50% of the cost of constructing the grade separation at Los Feliz, it is difficult to perceive upon what basis it can be contended that the order of the Public Utilities Commission constitutes an unreasonable exercise of the police power.

C. The Decisions Supporting the Order.

1. The Older Cases.

The Railroad concedes (Joint Br. for Appellants, 23) that until 1935 the decisions of this Court supported the principle that the state and its duly authorized political subdivisions had full power and authority to require railroad corporations, at their own expense, not only to abolish existing grade crossings but also to build and maintain suitable bridges or viaducts to carry highways newly laid out over their tracks, or to carry their tracks over such highways. The compelling reasons advanced by this Court in announcing its decisions in support of the principle have not changed materially, as an examination of the decisions will disclose. (*Erie R. Co. v. Board of Public Utility Commissioners* (1920), 254 U. S. 394;

Chicago, M. & St. P. Ry. Co. v. Minneapolis (1914), 232 U. S. 430; *Missouri Pacific Ry. Co. v. Omaha* (1914), 235 U. S. 121, and *Lehigh Valley R. Co. v. Board of Commissioners* (1928), 278 U. S. 24.)

2. The Nashville Case.

Due to the great stress that the Railroad places on the case of *Nashville C. & St. L. R. Co. v. Walters* (1935), 294 U. S. 405, it is desirable that the decision be closely examined. When that is done, it will be clearly indicated that the *Nashville* case supports the order which has been challenged on this appeal. In considering that case, the following points should be noted:

One:

The Tennesee statute there involved did not confer any discretion upon the Commission, but instead required the railroad in every case to pay one-half of the cost of a grade separation. (294 U. S. 412.) Here our statute gives to the Commission discretion to allocate the costs and does not purport to make an arbitrary assessment against the railroads.

Two:

In the *Nashville* case, the railroad conceded (294 U. S. 413)

> "that in Tennessee, as elsewhere, the rule has long been settled that, ordinarily, the State may, under its police power, impose upon a railroad the whole cost of eliminating a grade crossing, or such part thereof, as it deems appropriate."

The claim of unconstitutionality in that case rests wholly upon the special facts shown. Therefore the question as to what portion of the cost should be borne by a railroad in a grade separation such as we are concerned with in this proceeding was not even an issue in the *Nashville* case. The railroad conceded that in such a case as the one involved in this appeal it could be required to pay the entire cost!

Three:

The only point decided by this Court in the *Nashville* case was that the Supreme Court of Tennessee erred when it refused to consider the special facts in that case. And all this Court did was to remand the case to the Tennessee Court for consideration of those special facts. This Court did not purport to determine that even under the special facts there involved it was unconstitutional to assess one-half of the cost against the railroad. Instead it expressly stated that it was not making such a determination which was, in the first instance, for determination by the Tennessee Court. (P. 433.)

Included in the evidence and the findings of the trial court which the Supreme Court of Tennessee refused to consider were:

(a) that the underpass was part of a state-wide and nation-wide plan to foster commerce by motor vehicle on the public highways;

(b) that the decision to build the underpass, its location and construction, was not in any proper sense an exercise of the police power, but rather, as set forth in the bill of complaint, pursuant to a general plan of internal improvement fostered by the Congress of the United

States in conjunction with the several states to make a nation-wide system of super-highways in the interest of interstate commerce by motor vehicle, much of which is in active competition with the railroads themselves;

(c) that the underpass did not involve an exercise of the police power any more than many other features of this project, such as elimination of curves, grades, widening the pavement, *et cetera;*

(d) that the State highways of Tennessee (as distinguished from county and city roads and turnpikes) have their origin in the Federal-aid highway legislation. The aim of that legislation is a "connected system of roads for the whole Nation"; "to provide complete and economical highway transport throughout the Nation"; to furnish "a new means of transportation, no less important to the country as a whole than that offered by the railroads"; to establish "lines of motor traffic in interstate commerce." The immediate interest of the Federal Government is, in part, the national defense as well as the transportation of the mails;

(e) that relief of the unemployment incident to the business depression had been the main incentive for highway construction during the period in which the highway there in question was undertaken and completed;

(f) that Lexington, the city there involved, was a rural community of 1823 inhabitants located in a sparsely settled territory. *The construction of the new highway with the underpass was not designed to meet local transportation needs.* It was undertaken to serve as a link in a nation-wide system of highways. State Highway No. 20, as formerly routed, passed through Lexington on Clifton

Street, and crossed the railroad at grade; it was adequate for the existing traffic and that to be expected;

(g) that present facilities were deemed locally both safe and adequate which was attested by the fact that neither the city authorities, nor anyone else, had suggested elimination of that grade crossing; that the grade crossing was to remain unchanged after the new highway was put into use; and that the Clifton Street route continued to be used for the local traffic;

(h) that the underpass was required for a new and additional highway over which State Highway No. 20 was being rerouted, which was to become a part of a Federal-aid route between Nashville and Memphis;

(i) that the underpass was prescribed, *not upon consideration of local safety needs,* but in conformity to general plans of the Federal and State highway engineers, as being a proper engineering feature in the construction of a nation-wide system of highways for high speed motor vehicle transportation; and because it was the policy of the Federal authorities to make the avoidance of grade crossings a condition of a grant in aid of construction. *The requirement of the underpass, and the payment by the Railway under the 1921 Tennessee Act of one-half the cost of separating the grades, were results of the Federal-aid legislation. Final payment of Federal aid on this project was conditioned upon commencement of the construction of this underpass.* (Pp. 416-425.)

In other words, the underpass there involved was constructed in order to qualify for Federal funds, not to meet local traffic needs.

It is obvious that the *Nashville* case is unique and no authority for the contention that the law has now been changed so that railroads cannot be required to pay the cost of eliminating a grade crossing.

As was stated by this Court in the *Nashville* case (p. 431):

> ". . . No case involving like conditions has been found in any of the lower Federal courts; nor, excepting the case here under review, has any such been found among the decisions of the highest courts of any State."

This makes it abundantly clear that this Court did not intend that the *Nashville* case should be considered as reversing the long line of prior cases setting forth the railroads' responsibility in connection with grade separations.

The elimination of a grade crossing when required, not for the purpose of local transportation needs or public safety, but for the purpose of qualifying for Federal aid (as was the situation in the *Nashville* case), is clearly distinguishable from the grade separation involved in the instant proceeding. In the *Nashville* case we had a grade crossing in a community of 1823 people in a sparsely settled area; here we have a grade crossing in a metropolitan area populated by several million persons. In the *Nashville* case we had the new interstate highway created, leaving untouched the existing grade crossing. In the instant proceeding we have a situation where local transportation needs require the improvement. No new route is being established. The existing grade crossing is being eliminated to remove a dangerous condition, such

elimination being necessary in order that the street may safely handle local transportation needs.

It should also be emphasized that the Court expressly stated, in the *Nashville* case, at pages 432-433:

> "We have no occasion to consider now whether the facts presented by the Railway were of such persuasiveness as to have required the State court to hold that the statute and order complained of are arbitrary and unreasonable. That determination should, in the first instance, be made by the Supreme Court of the State. (Citing cases.) Moreover, since that court held the facts relied upon to be without legal significance, it did not enquire whether the findings were adequately supported by the evidence introduced in the trial court. The correctness of some of the findings is controverted by the State. Other facts of importance bearing upon the issue may possibly be deducible from the evidence, or be within the judicial knowledge of that court. When the scope of the police power is in question the special knowledge of local conditions possessed by the State tribunals may be of great weight. (Citing cases.) . . ."

We submit that the *Nashville* case, when properly analyzed, clearly supports the proposition that, in connection with a grade separation such as we are here considering, the Railroad can be required to pay the entire cost of the improvement, or such lesser amount as the Commission may deem proper.

Trucks and buses passing over the grade crossing involved in this appeal constitute a very small percentage of the total vehicular traffic using the crossing. [R. App. 168.] Local transit buses account for most of the buses and no certified carrier other than the two local transit

companies operate over the crossing. [R. App. 168.] Trucks that pass over are principally engaged in delivery services and other services pertaining to a neighborhood. [R. App. 168.] Testimony to the foregoing effect was uncontradicted. In the case of the Los Feliz grade crossing, we find that it is used by few if any vehicles in competition with the railroad, while it is used by a large number of vehicles carrying thousands of passengers to and from the Glendale station of Railroad. [R. App. 168.] The ever increasing volume of traffic at the crossing has been caused by the growth of the Los Angeles metropolitan area. [R. App. 190.]

3. Recent Cases.

There have been several cases decided since the *Nashville* case which have rejected the so-called benefit principle of allocating grade separation costs. These decisions indicate that the state courts involved did not interpret the *Nashville* case as reversing all of the previous decisions of this Court.

In *State of Missouri ex rel. Wabash R. Co. v. Public Service Comm.* (1936), 340 Mo. 225, 100 S. W. 2d 522, 109 A. L. R. 754, where the Public Service Commission of the State of Missouri assessed against the railroad 40% of the cost of an elaborate grade separation *through a public park*, the Supreme Court of Missouri, in sustaining this order, said (100 S. W. 2d 527):

> "The Wabash argues strenuously that the separation of the grade was made primarily for the convenience and benefit of the traffic on the highways and that the percent of cost of the improvement assessed against the railroads was grossly out of proportion to benefits received by them . . . It is

evident from the findings of the Commission, which were amply supported by the evidence, that due to crossing gates maintained by the Wabash the crossing was not very dangerous. The heavy traffic on the highway was compelled to stop for passing trains. This caused considerable delay, inconvenience, and so-called troublesome traffic jams, and materially interfered with the free use of the highway. By the law of necessity all traffic on a highway must give railroad trains the right of way . . . This is not such a case, but suppose a crossing was considered entirely safe because gates and watchmen were maintained by the railroad company, and let us further suppose that due to the number of trains passing over the crossing it materially interfered with the heavy traffic over a highway, would it be unlawful in such a case to assess a part of the cost of separating the grade crossing against the railroad? The separation in such a case would be for the benefit of the traffic upon the highway and not the railroad, yet the inconvenience created would be due entirely to the presence of the railroad. In such a case it certainly would not be unreasonable to assess against the railroad at least a part of the cost of restoring the usefulness of the highway. In the cases of *State ex rel. Alton Ry. Co. v. Public Service Commission,* 334 Mo. 985, 70 S. W. (2d) 52, and *State ex rel. Alton R. Co. v. Public Service Commission,* 334 Mo. 995, 70 S. W. (2d) 57, cited by the Wabash, structures separating grade crossings were in existence. These were found to be inadequate due to the increase in travel. The railroad was compelled to pay a part of the cost. Note what this court said in 70 S. W. (2d) 57, *loc. cit.* 60 (5-6): 'Elimination of danger of collision between vehicles and trains and benefit to the railroad be-

cause of that or other reasons is to be considered in proportioning costs, but these matters are not alone controlling. *Nor is benefit the fundamental consideration in proportioning expense. The true basis of apportionment of the cost has been declared by this court to be the extent to which the presence of the railroad at the place enhances the cost of a necessary improvement. State ex rel. Kansas City Terminal R. Co. v. Public Service Comm.*, 308 Mo. 359, 272 S. W. 957. If the presence of the railroad is the sole cause of an improvement necessary for the public safety, it may be required to pay the entire cost. *Chicago, Rock Island & Pacific Ry. Co. v. Public Service Comm.*, 315 Mo. 1108, 287 S. W. 617.' So in *State ex rel. M., K. & T. Ry. Co. v. Public Service Commission*, 271 Mo. 270, 197 S. W. 56, 59, court *en banc*, an existing subway was found inadequate and the major portion of the cost of enlarging the structure for the sole purpose of accommodating the travel upon the streets was assessed against the railroads. This court in the course of the opinion said: '. . . but the safety of passing trains is only one of the elements to be considered in matters of this kind. It is not the sole or controlling element. The convenience and necessities of the traveling public using Rollins Street must likewise be considered.' We see no distinction in principle between those cases and cases where the presence of a railroad renders a street inadequate to accommodate the traveling public."

In the case of *Lehigh & N. E. R. Co. v. Public Service Commission* (1937), 126 Pa. Super. 568, 191 Atl. 380, the Superior Court of Pennsylvania, in approving an order of the Public Service Commission of that state requiring the reconstruction of an old and inadequate un-

derpass and allocating the cost thereof among the state, the county and the railroad, said (191 Atl. 382):

> "The order of the commission was within its power and supported by the evidence, and is reasonable and in conformity with law.
>
> "Those conditions which may have brought about the necessity for a new underpass do not operate to relieve appellant. It is a question of providing for public safety by reasonable methods. The underpass built in 1911 may have been sufficient at that time; it is insufficient and perilous today. In order to prevent accidents and promote the safety of the public, the commission acted within its power, if the facts warranted, in ordering its reconstruction and in apportioning the cost thereof. Appellant's contention that it will receive no benefit from the proposed construction is not convincing. The question of benefits is not involved. 'It is the presence and ownership of the track involved, not any benefit conferred, which places liability on the railroad.' *Lehigh Valley R. R. Co. v. Public Service Comm.*, 105 Pa. Super. 423 at page 428, 161 A. 422 at page 424."

In the case of *Chicago Junction Ry. Co. et al. v. Illinois Commerce Commission* (1952), 412 Ill. 579, 107 N. E. 2d 758, the Supreme Court of Illinois, in sustaining an order of the Illinois Commerce Commission requiring the reconstruction of an old and inadequate underpass and allocating the cost thereof between the railroad and the city, said (107 N. E. 2d 762):

> "Appellants claim the apportionment is arbitrary because it assesses them for a public improvement from which they derive no benefits. This contention is without merit. As an adjunct to its right to regulate intersections of this type under the police power,

the commission also has the delegated authority to apportion the cost of repair or reconstruction when the same has been determined to be necessary. Illinois Central Railroad Co. v. Franklin County, 387 Ill. 301, 56 N. E. 2d 775; City of Chicago v. Commerce Comm. *ex rel.* Chicago and Western Indiana Railroad Co., 356 Ill. 501, 190 N. E. 896. Under the statute, the commission has the discretion to determine how the cost shall be apportioned, Chicago, Burlington & Quincy Railroad Co. v. Commerce Comm., 410 Ill. 60, 101 N. E. 2d 92, and we have held that this is a matter for the commission to determine from the evidence. Illinois Central Railroad Co. v. Franklin County, 387 Ill. 301, 56 N. E. 2d 775. If the evidence supports the apportionment order, as we believe it does here, lack of benefit to the party protesting it is not a controlling factor. In Chicago and Northwestern Railway Co. v. Commerce Comm., 326 Ill. 625, 628, 158 N. E. 376, 378, 55 A. L. R. 654, in answering the contention that the appellants advance here, we said: 'A railroad is a public utility deriving its franchise from the state, and, by accepting the same, agrees to submit to all burdens, conditions, and regulations imposed by the state with reference to its tracks and their intersections with highways necessary to promote or secure the safety of the traveling public.' And, further, 326 Ill. at page 629, 158 N. E. at page 379, 55 A. L. R. 654, 'The police power of the state is, however, in matters touching the public safety, a broad one, and, undoubtedly, for the promotion of public safety, railroad property may in a proper case be subjected to uncompensated obedience to police regulations * * * and the railroad company compelled to relocate its crossing of a highway and at its expense change from an overhead crossing to a subway when necessary to promote or preserve the

public safety.' In Nashville, Chattanooga & St. Louis Railway Co. v. Walters, 294 U. S. 405, 55 S. Ct. 486, 79 L. Ed. 949, the United States Supreme Court even advanced the theory that apportionment of cost to a railroad might be valid though the improvement benefited commercial highway users who made no contribution toward its cost. Where the police power is the basis of such an assessment, benefit to the party assessed is not necessary for the validity of the decision governing the assessment."

4. Decisions of the California Public Utilities Commission.

If the Railroad is arguing that the order of the Commission violates some public policy of the State by reason of the method used by the Commission in allocating costs, such an argument does not present a Federal question. (*Endicott-Johnson Corp. v. Encyclopedia Press* (1924), 266 U. S. 285, 290.) However, we will review the decisions of the California Public Utilities Commission to show that there has been no deviation from established policy.

Prior to 1933, the Public Utilities Commission had never followed the so-called benefits theory in allocating grade separation costs. In two reported decisions in 1932 the Commission specifically rejected the so-called benefits theory. (See Decision No. 24782, *Application of City of San Bernardino* (May 23, 1932), 37 C. R. C. 506; Decision No. 25069, *Application of the City of Los Angeles* (Aug. 15, 1932), 37 C. R. C. 784.)

In 1933 the *Goshen Junction* case was decided by the Commission (38 C. R. C. 380). This is the decision which the Railroad contends changed the Commission's policy, but a reading of it discloses that the contention is

unfounded. The *Goshen Junction* case involved a new segment of a state highway which the Department of Public Works wanted to construct without grade crossings. The heaviest traveled grade crossing which was to be eliminated by the new grade separation was used by from 3,500 to 5,500 vehicles and from 12 to 20 trains per day. Vehicle delay due to trains amounted to 104 vehicle hours per year while delay to trucks and buses which were in competition with the railroad amounted to 871 vehicle hours per year in making safety stops. The Commission commented in the decision on the fact that the California Department of Public Works had the new highway program well planned and could finance it from state gas funds and from Federal Aid for construction. The Commission took cognizance of the then existing depression and consideration was expressly given to "the economic structure, particularly at this time when revenues from practically all sources are materially below what they have been in the immediate past." The decision recited that the railroad had contended that if the Department of Public Works insisted on building the grade separation "when it had not been shown that the economic benefits justified the substantial expense of a separation," the railroad's assessment should be limited to the direct benefits to the railroad. The Commission then said, "with this contention we do not agree." The Commission then decided that if the Department of Public Works elected to proceed with the construction *where according to the record there is some question as to its present economic justification*, the railroad should pay a sum reflecting both its direct and indirect benefits and the Department of Public Works should pay the balance.

If any rule was established in the *Goshen Junction* case, it was that when the facts were such that the Commission could not find that the public safety, convenience and necessity required a separation of grades, then it would not be proper to make the railroad pay more than a sum representing the direct and indirect benefits to the railroad from the separation. Such a rule comports with a reasonable exercise of the police power.

The Railroad contends that from the date of the *Goshen Junction* decision until 1949, the Commission followed the so-called benefits theory in allocating grade separation costs. (Joint Br. for Appellants, 65.) That is not a fact. In its Petition for Writ of Review to the Supreme Court of California, the Railroad listed all of the decisions of the Commission from 1933-1950. [R. App. 92-97.] A review of some of the listed decisions which are not included in the published reports of the Commission will demonstrate that the Railroad is not correct in its contention.

On May 1, 1933, five months after the *Goshen Junction* decision, the Commission rendered its Decision No. 25889. [R. App. 92.] That decision involved an application of the Department of Public Works for a separation of grades at McConnell Station, near Sacramento, California. The grade crossing which was to be eliminated by the grade separation was used by only 2,500 vehicles and ten trains per day and the annual vehicle delay amounted to only 661 hours. The Commission remarked in its decision that the record in the proceeding did not justify construction of the proposed separation at that time. However, the Commission stated that since the Department of Public Works had the finances available and was

desirous of effecting the grade separation, it did not believe that it should deny the Department the right to make the improvement. The decision included the following statement:

> ". . . in passing upon the question of apportionment of costs, we must give due consideration . . . to the railroad's direct and indirect benefits and other obligations."

The Commission then ordered the railroad to pay $15,000 toward the cost of a grade separation and permitted the Department of Public Works to construct the type of structure it wanted to build provided it pay the balance of the cost.

Decision No. 25667 [R. App. 95] rendered on February 27, 1933, and also after the *Goshen Junction* decision, arose out of an application of the Department of Public Works for a separation of grades at Oil Junction north of Bakersfield, and involved facts which did not furnish economic justification for a grade separation. The traffic over the grade crossing involved in that proceeding consisted of approximately 3,000 vehicles and 16 trains per day. The benefits theory was not discussed, but even though there was no economic justification for a grade separation, the railroad was assessed $12,000 of the total estimated cost of $90,000. The Commission stated that "it is reasonable to assume that the railroad should participate with the public in effecting improvements to eliminate grade crossing accidents."

Except for the decisions which have previously been referred to, not a single one of the decisions rendered between 1933 and 1949 discusses the formula used by the Commission in allocating the cost of grade separations.

The decisions approved a previously agreed upon allocation of costs in almost every case.

Almost all of the grade separation applications filed since 1933 have been filed by the Department of Public Works of the State of California. The applications involved either grade separations on state highways to be built with Federal Aid funds, or grade separations on city streets or county roads to be built with Federal funds. In fact, not a single grade separation built since 1933 has been found which was not built with Federal funds in whole or in part except two grade separations for which the railroad paid. The Federal funds were made available to construct these grade separations on the basis that the railroads' assessment be limited as prescribed by Congress and the Federal Bureau of Roads and such assessments were unrelated in any way to the benefits or the legal obligations of the railroads.

In several decisions, the Commission pointed out that the grade separations were being financed from Federal Aid funds. In Decision No. 40511 [R. App. 92] the Commission pointed out that the Department of Public Works was agreeable to paying the full cost of the grade separation if Federal Aid funds were available therefor, but that if such funds were not available the Department reserved the right to present evidence showing the proper allocation of costs. The Commission specifically ordered that if Federal funds were not available, additional consideration would be given by the Commission to the allocation of costs.

It is readily apparent from the foregoing decisions that there has been no adoption of the benefits theory by the Public Utilities Commission. The Commission has indicated that it will protect the railroads against being re-

quired to separate grades, when the public agencies desire to construct grade separations at points where the Commission cannot find that the public convenience and necessity require the grade separation. The Commission has indicated that in those cases it will limit the assessment to the railroads to an amount slightly in excess of the direct and indirect benefits to the railroads. When the public safety, convenience and welfare have required that a grade separation be constructed and there has been no payment of the cost from Federal funds, the Public Utilities Commission has consistently followed the practice of allocating the costs of grade separations after a consideration of the direct and indirect benefits and the obligations of the parties involved.

In the Joint Brief for Appellants, the Railroad calls this Court's attention to the fact that there are a very large number of grade crossings which should be eliminated by the construction of grade separations, and that when this is done the burden will be intolerable upon the Railroad. It should suffice to say that the plan for the separation of grades at many grade crossings has been under consideration for almost 30 years. The two grade crossings involved in this appeal and in the *Santa Fe Railway Company Case No. 22* are the first two grade separation improvements undertaken in California within the last 20 years without the aid of Federal funds which involve city streets not on the State Highway System. The construction of grade separations on state highways will probably continue to be financed primarily from Federal funds; and if the local agencies are no better off financially in the next 20 years than they have been in the last 20 years, there is little likelihood of any burden being cast upon the railroads.

Point III.

The Order of the Public Utilities Commission Is Not Repugnant to the Commerce Clause of the Constitution of the United States or Any Statute Enacted Under the Authority Thereof.

In order not to be repetitive, the argument on this point in the brief of the appellee City of Los Angeles in the *Santa Fe Railway Company Case No. 22*, is adopted and urged as if fully set forth in this brief.

Conclusion.

For the reasons stated, it is respectfully submitted that the judgment of the Supreme Court of California entered in this case should be affirmed or the appeal dismissed.

Respectfully submitted,

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